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THE SPECIAL FACULTIES GRANTED TO THE CONGREGATION FOR THE CLERGY: FOR THE SALVATION OF SOULS AND THE GOOD ORDER OF THE ECCLESIASTICAL COMMUNITY: CONTEXT, PURPOSE, AND USE

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SUMMARY — This article seeks to view the Special Faculties given to the Congregation for the Clergy by Pope Benedict XVI in the wider context of similar procedural derogations granted to other dicasteries of the Holy See since the promulgation of the new Code, and to consider them in the light of their principle purpose, namely the good of souls and the good ordering of the ecclesiastical community. It examines the notable distinctions between the three faculties, their nature and the import of the derogations in question. It also touches upon some questions that prompt further reflection beyond the scope of this article, such as the principle of subsidiarity in ecclesiastical penal law and the relationship between the three aims of the Church's penal system as set out in c. 1341.

RÉSUMÉ — Cet article propose d'inscrire les facultés spéciales accordées à la Congrégation pour le clergé par le pape Benoit XVI dans le contexte plus large des dérogations procédurales semblables qui sont accordées à d'autres dicastères du Saint-Siège depuis la promulgation du nouveau Code. L'article examine les dérogations en question à la lumière de leurs objectifs premiers, soit le bien des âmes et le bon ordonnancement de la communauté ecclésiastique. Il traite des distinctions les plus remarquables que l'on peut établir entre les trois facultés, leur nature et l'importance de ces dérogations. L'A. soulève également certaines questions qui nous invitent à porter la réflexion au-delà du propos de son article, notamment le principe de subsidiarité en droit pénal ecclésiastique et les relations que l'on peut établir entre les trois objectifs du système pénal de l'Église, tels qu'ils sont énoncés au c. 1341.

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Introduction

On 30 January 2009, His Holiness Pope Benedict XVI granted to the Congregation for the Clergy certain Special Faculties concerning the loss of the clerical state by extra-judicial decree.[1] As the name suggests, the Special Faculties are exceptional by their very nature and do not enjoy the stability in law that is conferred by *motu proprio*. However, albeit enjoying a different status to the provisions of *Sacramentorum sanctitatis tutela* and its subsequent revisions, they nevertheless reveal a common canonical journey in the arena of the Church's penal law and the legal principles that lie at the heart of its ongoing development and concrete application. In this paper, it is hoped to set out some of those foundational principles as they are found in the aforementioned Circular Letter. Thereafter the common principles of the penal law as found in the Code of Canon Law will be examined insofar as the Special Faculties both respect these principles and emphasise certain aspects of them. Finally, some comments will be offered on the procedural *modus operandi*, especially during the diocesan phase of the procedure.

1 — *The Norm of Law and Special Interventions by the Supreme Authority*

The Special Faculties may be said to find themselves between two significant developments in the manner in which the Church lives her life as a community. On the one hand, they demonstrate the relationship that exists between the norm of law in the Code of Canon Law 1983—the product of a far-reaching revision of the law in the light of the Second Vatican Council—and the derogations and special provisions disposed subsequently by the Supreme Pontiffs either *motu proprio* or by Special Faculties; on the other hand they demonstrate the urgency that has determined a review of

[1] The Special Faculties were communicated to all the world's ordinaries by Circular Letter no 20090556, dated 18 April 2009. The authentic version of the document is in the Italian language and may be found in *Regno Documenti*, 13 (2009), pp. 392-396 (=Circular Letter). Subsequently, procedural guidelines were issued by a further Circular Letter no 20100823, dated 17 March 2010, which may be found in its original Italian version in *Ius Ecclesiae*, 23 (2011), pp. 229-235 (=Procedural Guidelines). It is accompanied by a commentary by F. PAPPADIA, "Congregazione per il Clero, Lettera Circolare per l'applicazione delle tre 'Facoltà speciali' concesse il 30 gennaio 2009 dal Sommo Pontefice: Ambito e procedimento di applicazione delle Facoltà speciali della Congregazione per il Clero," in *Ius Ecclesiae*, 23 (2011), pp. 235-251 (=PAPPADIA, "Ambito e procedimento di applicazione delle Facoltà speciali della Congregazione per il Clero").

perspective concerning the rights which all legal theory, secular or canonical, confers upon individuals accused of wrongdoing, and the common good that is specific to the Church, her nature and the place that sacred ministers hold in the ecclesiastical community by divine institution. It will, then, be helpful to look at these two aspects in order to understand the particular orientation of the Special Faculties in question within their broader context.

We know that the state of life of each member of the baptised is determined by sacrament, vocation and office; that is to say by one's ontological condition of being baptised or also in Holy Orders, by virtue of a special public and publicly recognised consecration to Christ, or by virtue of the office one holds or the apostolate one exercises in an official capacity. It will also be clear that the sacerdotal office in broad terms exercised by the priest—configured to Christ the Head and Shepherd in sacerdotal consecration—and the specific ecclesiastical office entrusted to him, demand of him a coherence of life with the Word that he is charged to proclaim vis-à-vis the authority of his state and office.[2] This coherence of life and mission is summed up in the phrase used by Pope Benedict XVI in the audience granted to the Congregation for the Clergy on the occasion of its plenary assembly on 16 March 2009, and taken up in the Circular Letter: the priest is called to live the *apostolica vivendi forma*. The entire tenor of the document and the foundational logic of the Special Faculties is the coherence that the Church expects of her sacred ministers, namely the coherence of life and ministry. As the Circular Letter puts it: "this right doctrinal precision takes nothing away from the necessary, indeed the indispensable tension leading towards moral perfection, which must find a place in every authentically priestly heart."[3]

1.1 — The Judicial Penal Process: A Preferred Means of Justice

Considering, then, the first aspect to which the Special Faculties in some way give a response, we are aware that the revision of the Code of Canon Law had amongst its guiding principles that Christ's faithful have the right not to be subjected to canonical penalty unless by the norm of law (cf. Guiding Principles 6° and 7° for the revision of the Code of Canon Law; c. 221 §3 CIC 1983).[4] This foundational principle is reflected throughout the penal

[2] Circular Letter, no 1.

[3] Circular Letter, no 2.

[4] Cf. J.I. ARRIETA, "L'influsso del Cardinal Ratzinger nella revisione del sistema penale canonico," in *La Civiltà Cattolica* (4 December 2010), pp. 430-440: 431 (=ARRIETA,

provisions of the Code, but perhaps most notably in canon 18 and in canon 1342 §2. Canon 18 establishes the principle, as we know, that penal laws must be interpreted strictly by their very nature. Canon 1342 §2 then establishes the principle that, to inflict a penalty, the judicial penal process is to be preferred, resulting in a judicial sentence subject to challenge. Such a process is obligatory when inflicting permanent penalties.

The administrative penal process that results in an extra-judicial decree (as provided for *ex* canon 1720) is considered by the Code of Canon Law as suitable for medicinal censures and expiatory penalties of a lesser gravity and of temporary duration. There is, then, a distinct preference in the Code for the judicial route, and this for obvious reasons: it provides a formal and robust guarantee of the right of defence, of the weighing of proofs, of the contentious challenge of the case; it provides for a thorough outcome by way of judicial sentence produced by a panel of judges, and such a sentence that can be challenged on a wider basis at the courts of second and third instance as the case might be.[5] While it is certainly true that the administrative penal process is not any less thorough (the principles and consideration that guide a judge are to be applied also to the ordinary in issuing a non-judicial decree: cf. c. 1342 §3), it is also true that the administrative penal process is aimed at brevity, speed of response and urgency of intervention on the part of the ordinary.

1.2 — Special Interventions of the Supreme Authority

1.2.1 — *Cardinal Ratzinger's Enquiry to Legislative Texts*

Despite the principle of preferring the judicial penal process, the Church has seen a series of measures that have derogated from the universal law and have facilitated the imposition of perpetual penalties, particularly dismissal from the clerical state, by extra-judicial decree. Interestingly, it has recently been reported by the secretary of the Pontifical Council for Legislative Texts, Bishop Juan Ignacio Arrieta, that the then prefect of the Congregation for the Doctrine of the Faith, Joseph Cardinal Ratzinger, wrote on 19 February 1988 to the president of the said dicastery (then known as the Pontifical

"L'influsso del Cardinal Ratzinger nella revisione del sistema penale canonico"); ACTA COMMISSIONIS CODICI IURIS CANONICI RECOGNOSCENDO, "Principia quae Codicis iuris canonici recognitionem dirigant," in *Communicationes*, 2 (1969), pp. 77-85: pp. 82-84.

[5] Cf. F.R. AZNAR GIL, "La expulsión del estado clerical por procedimiento administrativo," in *Revista española de derecho canónico*, 67 (2010), pp. 255-294: p. 263 (=AZNAR GIL, "La expulsión del estado clerical por procedimiento administrativo").

Commission for the Authentic Interpretation of the Code of Canon Law) to outline some of the difficulties already being noted in the area of the application of penalties.

The prefect of the CDF observed that certain requests for the dispensation from the obligations arising from sacred ordination, including celibacy, arrived from priests whose conduct was canonically criminal and scandalous, which was inconsistent with the nature of the dispensation as a "favour" ("gratia" - cf. cc. 59; 85; 290, 3°). In fact, although the delicts of such clerics would require the imposition of the penalty of dismissal from the clerical state prior to a request for the dispensation from celibacy, it was the observation of the CDF that the process provided in the Code of Canon Law 1983 made such a provision too procedurally complex, such as to dissuade ordinaries from initiating the judicial penal process. Cardinal Ratzinger sought the opinion of the president of the aforementioned Pontifical Commission concerning the possibility of a "more rapid and simplified procedure" in certain circumstances.[6] The incongruence of conceding a favour in situations where the imposition of a penalty would be the most appropriate response seems to have remained a constant preoccupation of the various dicasteries of the Holy See and may also be discerned as an element within the Special Faculties, which we are considering.[7]

The response of the aforementioned Pontifical Commission on 10 March 1988 effectively observed, not unreasonably, that the revised Code was of recent promulgation and that the difficulties expressed by the prefect of the CDF appeared to concern the capacity of ordinaries in the realm of the power of governance rather that the effectiveness of the procedural norms surrounding the penal process. The letter expressly refers to the guiding principles already cited, namely the guarantee of the right of defence which a derogation from canon 1342 §2 would entail in permitting the application of the severest penalties by an administrative penal procedure (*ex* c. 1720). The response also observed that liberal recourse to the administrative penal process might undermine the obligation an ordinary has to provide for the proper administration of justice within his jurisdiction.[8]

[6] Cf. ARRIETA, "L'influsso del Cardinal Ratzinger nella revisione del sistema penale canonico," pp. 433-434.

[7] Cf. D. CITO, "La pérdida del estado clerical *ex officio* ante las actuales urgencias pastorales," in *Ius canonicum*, 51 (2011), pp. 69-101: pp. 75-76 (= CITO, "La pérdita del estado clerical *ex officio*").

[8] Cf. ARRIETA, "L'influsso del Cardinal Ratzinger nella revisione del sistema penale canonico," pp. 435-436.

1.2.2 — Pastor bonus, *52*

Interestingly, the apostolic constitution *Pastor bonus* (29 June 1988) included a little-noted innovation in providing for the reservation of certain categories of delict to the competence of the Congregation for the Doctrine of the Faith (cf. art. 52), including the "more serious ones of behaviour" (*graviora delicta tum contra mores tum in sacramentorum celebratione commissa*).[9] As J.I. Arrieta observes, it would take some time before the Congregation could put flesh on the bones of the instrument of reservation provided for in *PB* 52.[10] This would eventually occur with the promulgation of the *motu proprio Sacramentorum sanctitatis tutela* on 31 April 2001 [*SST*].[11] An element of that document of interest for our discussion is the unappealable nature of some of the decisions taken under the rubric of *SST*, in the case of direct intervention of the Supreme Pontiff. The same might be said of the derogation from prescription, which has not been granted in the Special Faculties here under consideration.

1.2.3 — *Special Faculties Granted to the Congregation for the Propagation of the Faith*

Prior to this particularly important document, however, the then Cardinal Joseph Ratzinger had made a further strong intervention that resulted in the Congregation for the Evangelisation of the Peoples obtaining a Special Faculty to impose dismissal from the clerical state by extra-judicial decree or administrative penal process on clerics of territories within its jurisdiction who were found guilty of grave delicts against the sixth commandment.

[9] Cf. JOHN PAUL II, apostolic constitution *Pastor bonus*, in *AAS* 80 (1988), pp. 841-944: 874: "The Congregation examines offences against the faith and more serious ones both in behaviour or in the celebration of the sacraments which have been reported to it and, if need be, proceeds to the declaration or imposition of canonical sanctions in accordance with the norms of common or proper law". See ARRIETA, "L'influsso del Cardinal Ratzinger nella revisione del sistema penale canonico," p. 437. See also D. CITO, "La prescrizione in materia penale" in D. CITO (ed), *Il processo penale e tutela dei diritti nell'ordinamento canonico*, Milan (2005), pp. 208-233: pp. 231-232 (= CITO, "La prescrizione in materia penale").

[10] Cf. ARRIETA, "L'influsso del Cardinal Ratzinger nella revisione del sistema penale canonico," pp. 438-439.

[11] JOHN PAUL II, apostolic letter *motu proprio Sacramentorum sanctitatis tutela* (31 April 2001), in *AAS*, 93 (2001), pp. 737-739. For the *Normae*, communicated by a Circular Letter of the Congregation for the Congregation for the Doctrine of the Faith (18 May 2001) see *AAS*, 93 (2001), pp. 785-788. For the revised *Normae* of 2010, see *AAS*, 102 (2010), pp. 419-430.

This special faculty was granted by Pope John Paul II on 3 March 1997, subsequent to a plenary of the said dicastery, held the previous February and of which Cardinal Ratzinger was the *relator*.

The faculty provided a derogation from the general dispositions of the Code to allow *ex officio* dismissal from the clerical state in certain cases of urgency and gravity of sins against the sixth commandment. They were confirmed on 30 April 2005 by Pope Benedict XVI, and augmented further in 2008.[12] In fact, this special faculty represents the first concrete example of a derogation from the principle established in canon 1342 §2 so that one of the gravest penalties, perpetual in nature, could be imposed by an administrative penal process.[13]

The express motivation for such a concession, as the 1997 plenary of Propaganda Fide makes clear, was the practical impossibility of applying the procedural law in judicial penal processes in mission territories where there was a verifiable absence of trained personnel, resources and experience. Faced with such a reality, the principle was sustained that the procedural law itself could not be permitted to constitute an unforeseen obstacle for ordinaries in their obligation to ensure the good governance of their diocese and the good ordering of the ecclesiastical society.[14]

1.2.4 — Ex officio *Dismissal by the Congregation for Divine Worship and the Discipline of the Sacraments*

The Congregation for Divine Worship and the Discipline of the Sacraments, to which competence for petitions seeking dispensation from the obligations arising from sacred ordination was transferred according to the apostolic constitution *Pastor bonus* (cf. art. 68), also experienced the need to present cases for penal dismissal *ex officio* to the Supreme Pontiff. They found that there were cases of priests who, despite the various delicts they had committed, refused to petition for the dispensation from the obligations of the clerical state. In 2001, the then secretary of the Congregation related at their plenary that the dicastery had presented 22 cases to the Holy Father directly, asking him to dismiss certain clerics *ex officio et in poenam*.[15]

[12] Cf. CITO, "La pérdita del estado clerical *ex officio,*" 80.

[13] Cf. *Ibid*.

[14] Cf. C. PAPALE, "Il can. 1395 e la connessa facoltà speciale di dimissione dallo stato clericale *in poenam*," in *Ius missionale*, 2 (2008), pp. 39-58: p. 39 (= PAPALE, "Il can. 1395").

[15] Cf. F. TAMBURRINO, "Relazione nel corso dell'adunanza plenaria della Congregazione per il Culto Divino e la Disciplina dei Sacramenti," in *Notizie*, 37 (2001), pp. 406-461 (in particular pp. 428-433): p. 430. See also AZNAR GIL, "La expulsión del estado clerical por

All of these exceptional provisions derogating from the universal law in circumstances which correspond to the conditions laid down in the relevant special faculties have the following in common: the marriage of penal intervention with the favour of dispensation from celibacy, the urgency of intervention, the gravity of the delict, particularly in the realm of the sixth commandment (although the Faculties granted to the Congregation for the Clergy have a potentially much wider remit), and the need to prevent or confront scandal and to restore justice. They give a unique expression, in effect, to the principle espoused in canon 1752 both with respect to the victim of the delict and the perpetrator himself, as well as the good of the ecclesiastical society. The salvation of souls is the ultimate aim of these derogations from the universal law, while the underlying principles of justice are protected with respect to the right of defence and the reasoning to be followed in assessing the imputability of the delict and the guilt of the accused.

1.3 — Urgency and the Intervention of the Supreme Authority

The other tension demonstrated by the Special Faculties as a reflection of the developing approach to the application of the Church's penal law concerns the urgency that has determined a review of perspective concerning the rights which all legal theory, secular or canonical, confers upon individuals accused of wrongdoing, and the common good that is specific to the Church, her nature, and the place that the sacred ministers hold in the ecclesiastical community by divine institution. *SST*, of course, illustrated one approach to this in very definite terms, and it has been reflected to a greater or lesser degree and to varying satisfaction in particular laws and protocols developed in diverse particular Churches and their groupings around the world, at times approved by the competent dicastery of the Holy

procedimiento administrativo," p. 271. In this regard, it is interesting to note that the Norms issued by the Congregation for the Doctrine of the Faith on 3 January 1971 for the instruction of requests for dispensation from the obligations of the clerical state included a provision for the loss of the clerical state *ex officio*: "applicanda sunt etiam in casibus in quibus aliquis sacerdos, vel ob pravam vitam, vel ob errores in doctrina, *vel ob aliam gravem causam*, videtur post necessariam investigationem reducendus ad statum laicalem et simul ex misericordia dispensandus *ne periculum aeternae damnationis incurrat*". Cf. CONGREGATION FOR THE DOCTRINE OF THE FAITH, *Normae* (3 January1971), in *AAS*, 63 (1971), pp. 303-308: p. 308 [Italics ours]. The accompanying Circular Letter of the Congregation for the Doctrine of the Faith is found in *AAS*, 63 (1971) 309-312. For the subsequent norms see: CONGREGATION FOR THE DOCTRINE OF THE FAITH, Normae (14 October 1980), in *AAS*, 72 (1980) pp. 1132-1137.

See. We can note this in the relation that appears in all the aforementioned provisions between the desire of ecclesiastical authority that priests (and deacons), whose ministry has been gravely harmful and who have behaved in such a fashion as to render their ministry ineffective and objectively scandalous to the faithful, might voluntarily request the dispensation from the obligations arising from sacred ordination, including celibacy.

1.3.1 — *Dispensation as a Response to Delicts*

At first sight, this may seem a contradiction in terms. Not a few authors have raised the point that it is incongruous that a cleric accused of a *delictum gravior* should be invited to petition for a dispensation. This considers that a dispensation is of the nature of a favour or a grace, and yet it would be granted to an individual whose life manifestly contradicts the conditions by which a favour would normally be conceded. However, it has been noted that, in fact, when such a person voluntarily petitions for a dispensation from the obligations of his state, it corresponds to an acknowledgement on his part that his life and conduct has been such as to render his ministry ineffective and actually or potentially scandalous. In effect, the person is invited to place his ministry in the context of the ecclesiastical community and the nature of the same ministry within that concrete circumstance. In this way, the dispensation becomes a response to the acknowledgement of the objective unsuitability that the cleric recognises as an inescapable consequence of his behaviour.[16] It is a response for the good of the ecclesiastical community, in defence of the integrity of the sacred ministry and calls the cleric himself to orient his Christian life to the salvation of his soul by availing himself of the favour that he has been offered, with its attendant conditions.

1.3.2 — *Moral Certainty and Procedural Derogations*

Clearly, the relationship between the individual, the alleged victim and the ecclesiastical community must be balanced very carefully, with scrupulous respect for the essential principles of penal law. The presumption of innocence and the protection of the accused's good name must be carefully observed.[17] One cannot countenance a circumstance in which the good of the ecclesiastical community becomes a basis for undertaking actions that are, in

[16] See, for instance, CITO, "La pérdita del estado clerical *ex officio*," p. 98.

[17] On this theme, see C. GULLO, "Le ragioni della tutela giudiziale in ambito penale," in D. CITO (ed), *Il processo penale e tutela dei diritti nell'ordinamento canonico*, Milan, 2005, pp. 145-164.

the concrete circumstances, illegitimate and unjust. In the same fashion, scandal itself cannot suffice as a basis for the imposition of penalties. Penalties must be imposed as a response to the infringement of an objective legal norm that has established a particular delict and foresees certain penalties as the most appropriate means of reforming the offender, restoring justice, or repairing scandal.[18] This also explains the purpose of the procedural norms, which give expression to fundamental legal principles of justice, equity and the presumption of innocence.[19] In fact, in the various extraordinary provisions mentioned above, with the exception of *SST*, the only relaxation of procedural law concerns the choice of which type of process one might choose for the imposition a perpetual penalty and, in the case of confirmation by the Supreme Pontiff *in forma specifica*, the impossibility of appeal.

1.3.3 — *The Ordinary Power of the Local Ecclesiastical Authority and the Intervention of the Supreme Authority*

This last point brings us to observe that a distinct element of the various provisions reviewed above is the intervention of the supreme authority, by either confirming the decisions of the competent dicastery of the Holy See or acting *ex officio* at the recommendation of the same bodies. The number of such possibilities that have been provided for in recent years must raise great caution in all who have recourse to them and who are charged with administering them. Diocesan bishops, in particular, are ordinaries, and are imbued by the nature of their office with all the means necessary to govern their sees.[20]

[18] Cf. D.G. ASTIGUETA, "Lo scandalo nel CIC: Significato e portata giuridica," in *Periodica*, 92 (2003), pp. 589-651: pp. 607-609 (=ASTIGUETA, "Lo scandalo nel CIC"); IBID., "Facoltà concesse alla Congregazione per il Clero," in *Periodica*, 99 (2010), pp. 1-33: pp. 18-20 (= ASTIGUETA, "Facoltà concesse alla Congregazione per il Clero").

[19] Cf. K. PENNINGTON, "Innocente fino a prova contraria: le origini di una massima giuridica," in D. CITO (ed), *Il processo penale e tutela dei diritti nell'ordinamento canonico*, Milan, 2005, pp. 33-61: pp. 60-61.

[20] Ordinaries are to be understood in the sense of c. 134 §1. The text of Special Faculty I and II speaks simply of the ordinary. It is to be understood that the competent ordinary is not only the ordinary of incardination but also, if the circumstances demand it, the ordinary of the *locus delicti*, since any ordinary—particularly a diocesan ordinary—has a right to address delicts committed in his jurisdiction. That being said, it would appear evident that penalties are normally to be imposed by the ordinary of incardination. In the case of Special Faculty III, the ordinary is specified as being the ordinary of incardination. This follows logically from the fact that one must verify illicit and voluntary absence from the exercise of the sacred ministry, a matter which can only be verified by the ordinary of incardination due to the particular relationship of obedience that arises with incardination. Furthermore, with respect to the application of special faculties, an ordinary must approach the competent dicastery of the

The special provisions of the Supreme Pontiffs consistently emphasise their exceptional nature and their intent to place the Petrine ministry at the service of the Churches in response to unique and intractable situations that ordinaries are not able to confront on their own at a practical level. A certain scruple is called for in refraining from involving the Petrine ministry directly in matters that can be resolved at the local level with the means provided in the law, even if this may sometimes prove to be no small task.

1.3.4 — *The Ordinary Means of Maintaining Ecclesiastical Discipline*

The ordinary, then, is furnished with every means to govern his jurisdiction and to ensure proper ecclesiastical discipline, likewise having the means to intervene in a grave fashion by the imposition of penalties if circumstances so demand.[21] In a sense, number 5 of the Circular Letter manifests the principle of the gradual nature of penalties. Consequently, an ordinary faced with a cleric involved in misdemeanours or behaviour unbecoming of his state or contrary to his obligations, can warn him and constrain him more expressly to observe the universal or particular norms by means of a precept (cf. c. 49), even a penal precept (c. 1319) if the case warrants it. He can remove from office or transfer the individual to another office (cc. 1740 - 1752, 552, 149). He can remove faculties needed for the exercise of certain aspects of the sacred ministry, but always in accord with the norm of law (cf. cc. 974, 1109, 1111, 764). The ordinary can formally warn the cleric concerning his behaviour, admonish him and even, if the case and the facts so merit it, impose a penance (cf. cc. 1339 - 1340).[22] All such executive decisions should come about by an administrative decree and must always respect the norm of law and the principle of canonical equity. The right of hierarchical recourse exists, which should be avoided by opportune conciliation (cf. cc. 1733 - 1739).

1.3.5 — *Delicts and the Requirement of a Penal Intervention*

Ultimately, the ordinary, when faced with the prospect that a canonical delict has been committed, is obliged to enquire into the matter and estab-

Holy See, such as the Congregation for the Evangelisation of Peoples in the case of mission territories. In the case of religious ordinaries, dismissal from the cleric's institute would be an action to be undertaken logically prior to, or at least contemporaneous with, seeking dismissal from the clerical state under the rubric of special faculties if the case so warrants it.

[21] Cf. CONGREGATION FOR THE CLERGY, Circular Letter, no 5.

[22] Cf. PAPPADIA, "Ambito e procedimento di applicazione delle Facoltà speciali della Congregazione per il Clero," p. 239.

lish whether there is a case to answer, whether the alleged delict is imputable to the cleric (in this context) and what his (the ordinary's) response should be to the outcome of this preliminary investigation (cf. cc. 1717, 1718, 1341). Moreover, the ordinary will have to decide, if he believes the only adequate response to the situation is the imposition of an appropriate penalty, whether to proceed by judicial penal process by referring the matter to his tribunal through the promotor of justice, or whether an administrative penal process would be the more suitable approach (cc. 1718 §1, 3°, 1342 §2).[23] The ordinary, however, must recall that perpetual penalties, such as dismissal from the clerical state, can be imposed only by a judicial penal process since canon 1342 §2 expressly forbids the imposition of perpetual penalties by an extra-judicial decree. In fact, for this reason, if the ordinary believes that the only adequate response to the supposed delict is dismissal from the clerical state, he must take into consideration whether the universal law permits such a penalty for the delict in question. The ordinary at this stage of his deliberations must, in effect, at least in certain circumstances, take into consideration the projected outcome of the penal process, and he must accordingly determine which method is possible and apt for achieving such an outcome. In this context, Special Faculty II bears particular attention insofar as it allows the imposition of a perpetual penalty for delicts for which such a penalty is not expressly established, of which more below.[24]

2 — *The Special Faculties: an Intervention* in extremis

The Circular Letter under consideration makes it clear, however, that the Congregation for the Clergy, similar to other dicasteries as noted above, in dealing with the concrete situations that required its attention, came to the conclusion that in not a few circumstances ordinaries found themselves before situations that were not amendable to the practical or successful application of the penal law, not due to the deficiency of the law itself but due to the amalgam of factors which rendered it impossible or unfeasible to adequately administer justice in the concrete circumstances by the normal instruments of the law. In consideration of such difficulties as have required the dicastery's direct intervention, the Special Faculties were requested and granted by the Supreme Pontiff. It is for the Congregation for the Clergy to determine if the difficulties described by an ordinary are objectively

[23] Cf. AZNAR GIL, "La expulsión del estado clerical por procedimiento administrativo," pp. 264-266.

[24] Cf. CITO, "La pérdita del estado clerical *ex officio*," p. 92.

verifiable and justify an intervention by the Special Faculties.[25] It will be helpful to consider each of them in turn.

2.1 — Common Characteristics of the Three Special Faculties

While each Special Faculty has its own unique nature, it will be useful to draw out some general lines at first, before looking at each of the Faculties in turn. In essence, the first two Special Faculties provide for the possibility of imposing perpetual penalties by means of an extra-judicial decree through an administrative penal process. The third Special Faculty is quite different in nature in that it does not impose a penalty; instead, it grants a favour at the request of a third party as foreseen by the norm of canon 61 (cf. c. 290, 3°).[26] In the first two Special Faculties there is a particular element worthy of note, which illustrates their true motivation: with the penalty of dismissal from the clerical state is tied the dispensation from sacred celibacy, granted directly by the Supreme Pontiff. Consequently, the punitive and the gracious are tied in the first two Special Faculties. The reason for this is so that the scope of canonical penalties might be achieved, namely the reform of the offender, the reparation of scandal and the restoration of justice, in such a way that good order is returned to the ecclesiastical community and the cleric is offered every practical means of reconciling himself to that community and to God.[27]

Similarly in Special Faculty III, the cleric is dispensed from the obligations that derive from sacred ordination, including celibacy, so that good order might be maintained in the ecclesiastical society, confusion might be removed and the cleric might reconcile his life to the Church and to the the Lord. A further common feature of all three Special Faculties is that they are presented to the Supreme Pontiff for his final approval or confirmation *in forma specifica*.

Against such a sovereign decision, as will be clear, there is no possibility of appeal. While dismissal from the clerical state is immediately effective and the cleric is absolved of the obligations of the clerical state, for him to derive personal benefit from it and to reconcile himself with the Church, he must accept the favour that has been offered him along with the conditions

[25] Cf. Procedural Guidelines.

[26] Cf. PAPPADIA, "Ambito e procedimento di applicazione delle Facoltà speciali della Congregazione per il Clero," p. 247.

[27] Cf. PAPPADIA, "Ambito e procedimento di applicazione delle Facoltà speciali della Congregazione per il Clero," pp. 236-237. See also CITO, "La pérdita del estado clerical *ex officio*," pp. 97-98.

attached thereto. There is, then, a distinction between the Sovereign act of the Supreme Pontiff and its immediate effectiveness for the good of the ecclesiastical community, and the favour which is held out to the cleric for his personal reform and the good of his soul. It is for him to make that deeply Christian act of repentance and reconciliation for the true good of his own soul and to be welcomed again fully into the communion of the Church. The nature and scope of the Special Faculties suggests why the outcome is communicated by rescript.[28]

2.2 — The Special Faculties, Objective Need, Due Process, and the Principle of Subsidiarity

In this fashion, the Special Faculties establish a relationship between the procedural derogations granted to the Congregation for the Clergy and the sovereign act of the Supreme Pontiff. The Congregation is not free to use them arbitrarily, but must submit its decrees for the final approval of the Supreme Pontiff. Thus, it is not merely a matter of seeking the dispensation from sacred celibacy, which is reserved exclusively to the Supreme Pontiff, but of imbuing the entire decision with the certainty of papal confirmation *in forma specifica*.[29]

It seems opportune to observe that the possibilities offered in the Special Faculties are intended for intractable situations and must not supplant the norm of law, which foresees the means already reviewed as the normal manner of ensuring ecclesiastical discipline, the good order of the ecclesiastical society and the good of souls, both in general and in particular. In this respect, the principle of subsidiarity becomes particularly relevant. It is the obligation of the ordinary to ensure ecclesiastical discipline amongst the flock entrusted to his care, for the good of the particular Church and the souls of the individuals concerned. He is provided with every means required to be a true pontiff amongst his own people, imbued with the jurisdiction required by the nature of his office and exercising ordinary power - legislative, judicial and executive - in accord with the norm of the universal law by which ecclesiastical communion in facilitated (cf. cc. 381, 391, 392, *LG* 25, 27). [30]

That being said, the Special Faculties constitute an intervention of the supreme legislator in derogation of certain procedural laws of the universal

[28] Cf. PAPPADIA, "Ambito e procedimento di applicazione delle Facoltà speciali della Congregazione per il Clero," p. 251.

[29] Cf. CITO, "La pérdita del estado clerical *ex officio*," p. 97.

[30] Cf. V. DE PAOLIS, "La disciplina ecclesiastica al servizio della comunione," in *Monitor ecclesiasticus,* 116 (1991), pp. 15-48: pp. 20-21.

discipline in order to come to the aid of bishops who find themselves before certain intractable or urgent situations of indiscipline. In view of the principle of subsidiarity and the general principle of the rule of law, by which everyone has the right to be tried according to the lawful system of justice duly promulgated by the competent ecclesiastical authority (cf. c. 221), not only is it to be scrupulously avoided that the Special Faculties be utilised in an arbitrary fashion, but ordinaries ought to have recourse to the supreme authority of the Church with the greatest prudence and circumspection.[31]

2.3 — Special Faculty I: Canon 1395

Moving on to examine the text of the three Special Faculties in turn, it is immediately apparent that the only real novelty foreseen in Special Faculty I concerns derogation from the provision of canon 1342 §2, allowing for the imposition of a perpetual penalty, namely dismissal from the clerical state, by an administrative penal process that results in an extra-judicial decree.[32] The delicts considered here are quite clear from the point of view of the law and jurisprudence. They are the delict of concubinage (which is not, of course, merely co-habitation) as disposed by canon 1395 §1, and other delicts against the sixth commandment as disposed by canon 1395 §§1-2.[33] Some comments may be helpful to ensure the proper instruction of such cases. While the law disposes that a cleric who attempts marriage, even only civilly, is automatically suspended with all the effects of canon 1333, the ordinary is obliged to proceed to the declaration of the penalty according to the norm of law.

2.3.1 — *The Gradual Nature of Penal Intervention*

Since with such an act one is already in the sphere of the application of medicinal penalties or censures, the provisions of canons 1717-1720 are to be applied. In this circumstance, since the fact should be easily proven from documentation, witnesses or self-evident proofs, the matter should proceed expeditiously to the issuance of an extra-judicial decree, which decision

[31] Cf. PAPPADIA, "Ambito e procedimento di applicazione delle Facoltà speciali della Congregazione per il Clero," p. 240.

[32] Cf. M. GOŁAB, "Facultades especiales para la dimisión del estado clerical," in *Ius canonicum*, 50 (2010), pp. 671-683: p. 674 (= GOŁAB, "Facultades especiales para la dimisión del estado clerical").

[33] Cf. ASTIGUETA, "Facoltà concesse alla Congregazione per il Clero," pp. 8-12. See also PAPALE, "Il can. 1395," pp. 41-50.

should be canonically public in nature. The canon sees this as the first and most effective means to bring an end to the scandalous situation created by the cleric, with the expectation that he repent. Obviously, a cleric who duly repents must be the subject of various administrative provisions of the ordinary to address the needs of supervision, reparation of scandal and suitability for office (cf. cc. 1339-1340, 49, 1319, 277 §3, 149). The repentance of the cleric must not only be weighed by the ordinary, but he must also be satisfied that it is verifiable and ensure it conforms to the ends of the Church's penal system, namely the reform of the offender, the reparation of scandal and the restoration of justice (cf. cc. 1341, 1347 §2, 1358).

In the absence of the desired repentance of the cleric, the ordinary can proceed with other privations as far as dismissal from the clerical state. (N.B. Such actions must always be distinguished from administrative decisions of ordinaries that may have similar results but are motivated by entirely different reasons and by means of purely administrative decrees).[34] The ordinary must act expeditiously to address the situation and must evaluate which is the most appropriate penalty for the concrete circumstances, especially taking into consideration the scandal provoked and the likelihood of the cleric's repentance.[35]

2.3.2 — *Concubinage and Other Enduring Sins against the Sixth Commandment*

The delict of concubinage refers, of course, not merely to a state of permanent cohabitation, but any sexual relationship that has the qualities of stability and "cohabitation" as these terms are understood by canonical jurisprudence. As to the other delicts considered in canon 1395 §1, the quality of the permanence or endurance of the behaviour and that of the scandal produced must be considered.[36] As with any delict, and notwithstanding the moral gravity of sins against the sixth commandment, for these to be considered delicts they must for the application of this canon have the qualities of being external (as distinct from "public", considered in canon 1395 §2) and a cause of scandal.

Another category of delicts is considered in canon 1395 §2, namely those committed with violence, by threats, publicly or with a minor under the age

[34] Cf. F. PAPPADIA, "Ambito e procedimento di applicazione delle Facoltà speciali della Congregazione per il Clero," p. 244.

[35] Cf. ASTIGUETA, "Facoltà concesse alla Congregazione per il Clero," p. 7.

[36] Cf. PAPALE, "Il can. 1395," p. 41-46.

of sixteen. The latter category must now be considered in light of *SST* and its revisions.[37] Any or all of these qualities may characterise the behaviour as a delict, and it is not necessary that the acts be consummated. The phraseology of the canon is so generic as to allow its application to a considerable range of behaviours that may merit a corrective and penal intervention by ecclesiastical authority. Depending on the delict in question, its gravity and the concrete manifestation of the characteristics already described, the judge must determine the most appropriate penalty, not excluding dismissal from the clerical state. It will be clear, however, that an ordinary who has recourse to the Special Faculties is seeking precisely this most serious of penalties due to the nature of the facts and circumstances of the case and will have considered this at the outset (cf. c. 1718 §1, 1°, 3°).[38] That being said, the text of the Special Faculties does not exclude the imposition of other penalties of lesser gravity but with the quality of perpetuity not allowed by extra-judicial decree.

2.3.3 — *Procedure* ex *Canon 1720: Penalty by Extra-judicial Decree*

As the Procedural Guidelines issued by the Congregation for the Clergy make it clear, it is envisioned that the procedure for the application of the Faculty in question derives from canon 1720, namely an administrative penal process that concludes with the issuance of an extra-judicial decree. While the ordinary could himself issue such a decree and present it to the Congregation for the Clergy for consideration under the Special Faculties, thus acknowledging that he lacks the power to impose dismissal from the clerical state by extra-judicial decree, it is more likely that the formulation of the ultimate decree will be left to the same dicastery, to be presented to the Supreme Pontiff for his final approval *in forma specifica*.

The procedure to be followed is substantially that provided by canon 1720, which must be followed in light of the other canons pertinent for the collection and weighing of proofs, moral certainty concerning the crime and its imputability to the accused, and the suitability of the penalty of dismissal from the clerical state for the delict in question.[39] Thus, one presupposes that the preliminary investigation has been undertaken as foreseen by canon 1717, unless the ordinary deems it superfluous due to the notoriety of the

[37] Cf. ASTIGUETA, "Facoltà concesse alla Congregazione per il Clero," pp. 9, 11. See also CITO, "La pérdita del estado clerical *ex officio*," p. 91.

[38] Cf. ASTIGUETA, "Facoltà concesse alla Congregazione per il Clero," pp. 22-23.

[39] Cf. Ibid., 13-14; See also PAPPADIA, "Ambito e procedimento di applicazione delle Facoltà speciali della Congregazione per il Clero," pp. 242-245.

delict. The preliminary investigation is to be undertaken in the expeditious manner expected by the law to establish a basis for the more serious intervention of a penal procedure. It is also to be presumed that the ordinary has considered the outcome of the preliminary investigation in the light of canon 1718, and that he has thus established good reasons to proceed by means of an administrative penal process with a view to petitioning the application of the Special Faculties. In sum, therefore, it is necessary to provide for the various actions foreseen by canons 1717 and 1718 by the appropriate administrative decree, duly motivated in law and in fact (cf. c. 50).[40] Without going into the various canons that guide the ordinary or his duly appointed delegate in conducting a trial (cf. c. 1342 §3), it may be useful to note a number of elements that cannot be lacking in the instruction of an administrative penal process, as any penal process.

(a) The accused must be notified of the accusation and afforded the right to present a defence and to avail himself of canonical representation through a duly appointed advocate with at least the tacit approval of the ordinary (cf. c. 1483).[41] Where the accused is duly and legitimately cited but refuses to cooperate, to appear or otherwise fails to respond, he should be declared absent by decree. In this regard his right to appear later in proceedings remains intact, and he should continue to be notified concerning the formal acts of the process and afforded the opportunity to present a defence. Ideally, the accused will wish to participate in the process, will provide a deposition or may already have left various declarations relevant to the delict of which he is accused.[42]

(b) When all of the evidence has been collected, it is to be submitted for the review of two assessors, who shall have been duly appointed by the appropriate decree at the outset. Although it would be highly appropriate given the gravity of the matters under consideration and the penalty to be imposed that the assessors be qualified in canon law, this is not required

[40] PAPPADIA, "Ambito e procedimento di applicazione delle Facoltà speciali della Congregazione per il Clero," p. 245.

[41] It is true that the text of the Circular Letter does not expressly foresee the appointment of an advocate, and some authors sustain that in an administrative process there is no duty to provide for such an appointment; nevertheless, it is highly appropriate that the accused should not only be invited to present a defence, but also advised concerning his right to name an advocate in accord with the law. Cf. A. CALABRESE, *Diritto Penale Canonico*, 2nd ed., Roma, 1996, p. 165. The Procedural Guidelines, however, expressly foresee the possibility. Cf. PAPPADIA, "Ambito e procedimento di applicazione delle Facoltà speciali della Congregazione per il Clero," p. 243.

[42] Cf. PAPPADIA, "Ambito e procedimento di applicazione delle Facoltà speciali della Congregazione per il Clero," pp. 243-244.

by the law. The ordinary is free to appoint any priest he wishes (cf. c. 1424). They ought, however, to be prudent and judicious individuals and esteemed for their impartiality. The proofs should be presented to the assessors in sufficient time to allow them to examine them thoroughly and to arrive at their conclusions. They should then come together with the ordinary and discuss the matter amongst themselves. The assessors also submit their written and signed opinions. A record should be drawn up of the discussions and the outcome thereof. The ordinary is not bound by their opinion, and they do not sign the eventual decree.[43]

(c) The ordinary issues his decree according to the norm of canons 1344-1350 if he is certain that the delict has been proven and is imputable to the accused, and if it has not fallen into prescription (cf. c. 1362).[44] It is important here to note that the Special Faculties under discussion do not afford the Congregation for the Clergy a derogation from prescription. For this reason, it is of the greatest importance that ordinaries who would wish to have recourse to them have carefully considered the question of prescription. It may be noted that the decree considered in canon 1720, 3°, like any decree, must present the reasons in law and in fact for the decision reached, at least in a summary fashion (cf. cc. 35-58, particularly c. 50). That being said, given the grave and urgent nature of the delicts under consideration in the Special Faculties, it seems more than opportune that the decree in question be well motivated in law and in fact. The Procedural Guidelines issued by the Congregation for the Clergy on 17 March 2010 provide a concrete and schematised guide to the application of canon 1720 for the proper instruction of petitions for the application of the first and second Special Faculties.

2.4 — Special Faculty II: Canon 1399

Special Faculty II merits some attention due to the unusual nature of the general norm that is invoked, and because of the significant derogations from the universal law provided beyond that of Special Faculty I (cf. c. 1342 §2). As will be known, canon 1399 provides for the situation where the competent ecclesiastical authority (many authors hold that the possibility is

[43] Cf. ASTIGUETA, "Facoltà concesse alla Congregazione per il Clero," p. 14. The fact that the ordinary is not formally bound by their opinion does not mean that he can treat it lightly: he ought to have a well-motivated reason for a serious divergence of opinion and ought to be able to weigh all of the arguments submitted, for and against the culpability of the accused and the penalty most suitable as a response to the actions under consideration.

[44] Cf. ibid.

open to both the ordinary and the judge) may impose penalties that are not expressly provided for in universal or particular law, when a member of Christ's faithful has violated a divine (natural or positive) or ecclesiastical ("canonical") law.[45] While the purpose of this general norm is to equip the competent ecclesiastical authority with the means necessary to intervene in the case of unforeseen violations of the law which, given the "special gravity" of the violation demands a penal intervention with the intent of preventing or repairing scandal, it must be noted that the law itself forbids the penalty of dismissal from the clerical state to be applied except where it is expressly foreseen in the universal law.

2.4.1 — *Violation of the Law, Scandal, and Urgency*

To understand the canon, one must keep in mind the concept of a delict, namely the violation of a law, punishable when the delict is imputable to the accused. To punish such a delict, one must establish culpability by the processes laid down by the universal law and, in the case of canon 1399, one must establish the special gravity of the violation of a law which, in itself, would not merit a punitive intervention, much less the punishment of dismissal from the clerical state.[46] Given the exceptional nature of the norm, the qualities specified in the canon must be present simultaneously, namely the violation of the law and the scandal that has been provoked, or could be provoked without the intervention of ecclesiastical authority.

In this respect, it may be useful to note briefly that scandal in itself cannot be a sufficient motive for ecclesiastical authority to intervene with a punitive measure: it must be possible to manifest the violation of a law, divine or ecclesiastical, that is of such a gravity as to have provoked scandal or that could provoke scandal. This intervention is merited principally by the fact that a moral law, or an otherwise highly esteemed value expressed by an appropriate ecclesiastical norm, has been violated in such a way as to demand an intervention.[47] In the case of the Special Faculties, which foresees the possibility of

[45] Cf. ASTIGUETA, "Facoltà concesse alla Congregazione per il Clero," p. 22

[46] The canon permits a sanction only in the case of law in the formal legal sense, and not decrees, much less precepts. Penal laws are to be interpreted strictly (cf. c. 18). On this matter, see ASTIGUETA, "Facoltà della Congregazione per il Clero," p. 17; Ibid., "Lo scandalo nel CIC," pp. 605-609.

[47] Cf. ASTIGUETA, "Lo scandalo nel CIC," p. 607. The question of scandal, its nature and definition in canon law, its secular counterparts, amongst the faithful and in society would be the basis of an interesting contemporary consideration that is beyond the scope of this paper.

imposing the penalty of dismissal from the clerical state, this violation must be of a particularly grave variety. In light of the wording of the canon itself and the underlying purpose of the Special Faculties, the two elements of the offender's reform and of the protection of the good order of ecclesiastical society come together once again. The salvation of the individual cleric is in question, as is the good order of ecclesiastical society as a prerequisite for each member of the faithful to have the means of salvation at their disposal.

2.4.2 — *Derogations and the Administrative Penal Procedure* ex *Canon 1720*

Special Faculty II derogates from a number of procedural norms (cf. cc. 1317, 1319, 1342 §2, 1349) that prohibit dismissal from the cleric state as a penalty in certain types of circumstances. From the text of the canon, it is also clear that the term "ordinary" includes all its possible manifestations, and thus also regards religious once they have been dismissed from their institute according to the norm of law.[48] The process to be followed for the application of Special Faculty II is the same as that for Special Faculty I, namely the penal administrative process, which presumes that a preliminary investigation has been conducted and the results have been found to call for an intervention of the variety foreseen in this Special Faculty (cf. cc. 1717-1718). By the same logic, the relevant canons with regard to the collection of proofs, the right of defence, and the weighing of evidence are to be followed, along with those by which the suitability of the proposed penalty are considered.

It is important that with the outcome of the preliminary investigation the ordinary has considered the question of prescription, which in the case of Special Faculty II is three years only (cf. c. 1362 §1, 3°, with attention to the prescription of c. 1362 §2). As already noted, the ordinary must also estimate in real terms which penal process is open to him and thus whether to he can initiate a judicial penal process *in loco* or must have recourse to the exceptional provisions of the Special Faculties. Obviously, where a judicial process has begun *in loco*, it should continue to its conclusion, whereby the normal right to appeal exists to the various higher instances.

2.5 — Special Faculty III

Special Faculty III must be clearly distinguished from the first two both as to its nature and the procedure intended for its instruction. In the first

[48] Cf. ASTIGUETA, "Facoltà della Congregazione per il Clero," p. 22.

place, it is necessary to underline that Special Faculty III is in no way penal: it is not a dismissal from the clerical state as a penalty.[49] The text of the Faculty and the situation considered in number 5 of the Circular Letter gives us to understand that it is a means to address the situation of clerics who have illicitly left the exercise of the sacred ministry of their own volition for a period of five consecutive years and who refuse to reconsider their situation and return to the exercise of the sacred ministry, to seek a dispensation from the obligations arising from sacred orders, or whose dismissal from the clerical state for delicts which they may have committed or that may be in continual progress is either impossible or gravely difficulty for well-founded reasons.

2.5.1 — *Illegitimate Absence and the Ordinary Means of Maintaining Ecclesiastical Discipline*

It may be opportune to observe immediately that a return to the exercise of the sacred ministry must necessarily be according to the discipline and the doctrine of the Church, and according to the manner determined by the ordinary in accord with the norm of law, having taken account of the suitability of the cleric for a determined office or apostolate and the manner of his life in the period of illicit absence. The ordinary would exercise the necessary responsibility of his office in verifying that contumacy has come to an end, that there is no danger of scandal and that justice has been restored, as the case may be (cf. c. 1341).[50] These observations may make it clear that in many cases an ordinary is not simply confronted with the departure of a cleric from the exercise of the sacred ministry, but frequently also finds himself before a cleric who has committed or is in the course of committing a delict.

Here one must return to the question of the ordinary means provided by the law to confront such a situation, including formal warnings, reproaches, administrative deprivations, administrative removal from office, penal precepts, and suitability penalties such as penal removal from office, suspension, etc. (cf. cc. 1339, 974, 1111, 764, 552, 1740 - 1752, 49, 1319, 281, 1350, 1333). Along with these, there is the merciful willingness of the Church through the power of the Supreme Authority to dispense by rescript (cf. cc. 59, 85, 290, 3°) a cleric who, having repented of his actions, petitions

[49] ASTIGUETA, "Facoltà della Congregazione per il Clero," p. 28.

[50] Cf. PAPPADIA, "Ambito e procedimento di applicazione delle Facoltà speciali della Congregazione per il Clero," p. 249.

to be absolved from the obligations which arise with sacred ordination, including sacred celibacy. This latter approach will often be the most appropriate means to solicitously bring a situation of scandal and confusion to an end and that might more readily win the conversion of the souls involved, which frequently is not limited to the cleric alone. That being said, the nature of the favour in question is that the petitioner is indeed in a condition to receive it, namely that he displays a real and concrete willingness to live his life according to the Gospel, expressed in the Church's doctrine and discipline. It is also true, however, that even an individual whose actual condition of life contradicts any true repentance and willingness to reform on his part may, by seeking the dispensation, acknowledge his objective unsuitability for the exercise of the sacred ministry and the appropriateness of bringing to an end a situation of confusion and scandal within the ecclesiastical community.[51] Where these conditions are entirely lacking, or where a cleric has absented himself completely without further interaction or communication with his ordinary, and the penal route is not feasible, Special Faculty III provides a means of bringing to an end a situation that *objectively* creates profound disturbance in the ecclesiastical community and removes the cleric from the ordinary's ability to fulfil his duty of ensuring the maintenance of ecclesiastical discipline (cf. cc. 384, 392).

2.5.2 — *Rescript, Favour, and the Effects of Illegitimate Absence*

Of its nature the third Special Faculty may be considered a rescript in the sense of c. 61 (cf. c. 290, 3°): a petition made by a third party (namely, the ordinary) for an individual who neither requests the favour nor consents to the request, and which is valid even without their assent or acceptance thereof.[52] One might say that the ordinary makes the request that the cleric refuses to make both for the cleric's own good - so that he has no excuse not to reconcile his life to the Church - and for the sake of the ecclesiastical community which is harmed by the situation of confusion and scandal which prevails. In this respect, although the petition itself may be contested, the possibility of doing so with the effect of the loss of the clerical state and all the obligations that pertain to it, including celibacy, might be considered as a genuinely "pastoral" intervention on the part of ecclesiastical authority for the good of souls, both the individual and the community.

[51] Cf. Cito, "La pérdita del estado clerical *ex officio*," p. 98.

[52] Cf. Pappadia, "Ambito e procedimento di applicazione delle Facoltà speciali della Congregazione per il Clero," pp. 247, 251.

Objectively, illicit and voluntary departure from the sacred ministry is a grave act of indiscipline whereby the cleric removes himself from the authority of his ordinary and from the obligation of the same ordinary to supervise his sacred ministry and life; it provokes confusion amongst the faithful and often undermines their faith in concrete terms; and it constitutes a dereliction of the obligations that arise from sacred ordination, solemnly and publicly undertaken by the cleric. It is moreover an offence against the nature of sacred ordination itself, which demands of the ordained that they dedicate their lives exclusively and definitely to the sacred ministry according to the Church's doctrine and discipline. As such, therefore, the *factispecies* considered constitutes a delict punishable under the norm of c. 1399.[53] It would have been consistent with the law to have provided for a punitive intervention as a response to this case.

However, it seems clear from the text of number 5 of the Circular Letter, that the Congregation for the Clergy, given its considerable insight into the concrete difficulties experienced by ordinaries and the situation in which not a few clerics find themselves, sought Special Faculty III as we have it, in the manner of a "gracious" intervention. It is designed to provide the cleric with every possibility of resolving his situation in a peaceable manner that might bring him more readily back into the communion of the Church, and that provides a resolution to the situation of confusion and scandal in the ecclesiastical society. Notably, Special Faculty III does not consider the presence of contumacy in the cleric, since the orientation of the Faculty is not punitive.[54] The only conditions established for the application of Special Faculty III is that the cleric's illicit and voluntary

[53] Astigueta considers that canon. 1389 §2 could be the more appropriate foundation of the III Special Faculty, insofar as one is considering a response to a delict. Thus, he considers that the cleric's illicit and voluntary absence constitutes a derogation of duty, culpable negligence concerning ecclesiastical power, ministry or acts of office that causes harm to others of its nature—confusion, scandal etc. He goes on to specify, however, that the absent cleric's behaviour, even if not malicious, would be culpable. He infringes the law that would insert his ministry within the hierarchical order—where, of its nature, it must find itself. The same author then postulates canon 1371, 2° as the offence which a cleric in this situation commits: he refuses to obey a legitimate command of his ordinary—in this a case a command that calls the cleric to fulfil the obligations of his state in accord with the Church's discipline. In such an arena, it will be clear that the discipline in question arises from the very nature of the sacrament of order and its place within the hierarchy of order in relation to ecclesiastical society. As the author quite correctly identifies, however, the text of Special Faculty III does not require that contumacy be proven or even considered an essential element in the punishment of any delict. Cf. ASTIGUETA, "Facoltà della Congregazione per il Clero," p. 25.

[54] Cf. ASTIGUETA, "Facoltà della Congregazione per il Clero," p. 27.

absence from the exercise of the sacred ministry has endured for five consecutive years, and that moral certainty be established concerning this fact. Other than the objective fact that the abandonment of the exercise of the sacred ministry harms the individual and the community, the concrete situations of clerics includes a wide variety of behaviours and real situations and does not always come with a contumacious attitude or intent. This exceptional intervention on the part of ecclesiastical authority for the reasons already elaborated constitutes a desire for the good of souls in those situations not amenable to the normal remedies of law, even after genuine effort on the part of the ordinary concerned.[55]

2.5.3 — *The* factispecies *of Special Faculty III*

As to the procedure for the instruction of Special Faculty III, the central preoccupation is to establish the three elements that taken together constitute the *factispecies*, namely voluntary and illicit absence from the exercise of the sacred ministry for a period of five consecutive years or more.[56] It is worthwhile considering each of these briefly.

(a) Absence from the exercise of the sacred ministry is to be understood as meaning that the cleric has subtracted himself from accepting the legitimate commands of his bishop, and thus finds himself objectively in a state of grave disobedience. Absence also contains all those forms of ministry that are illicit by virtue of the same quality: because they are exercised in contravention of the ordinary's legitimate commands and to the Church's doctrine and discipline. Thus, the absence in question here must be understood by the qualifying element of illegitimacy. The same is true for one who, being duly admonished, expresses an unwillingness to place himself once more under obedience to his bishop, or rather expresses his unwillingness to adhere to the obligation of obedience that arises from sacred ordination by the very nature of the Church's hierarchical order. One cannot "return" on one's own terms. Moreover, as previously alluded to, a bishop who accepts a cleric back to the exercise of the sacred ministry must carefully and prudently weigh his suitability for ecclesiastical office or any other appointment, taking into account the manner of life of the cleric in the intervening period and obliging every such cleric to a period of formation and preparation for a return to

[55] Cf. Gołab, "Facultades especiales para la dimisión del estado clerical," p. 681.

[56] Cf. Pappadia, "Ambito e procedimento di applicazione delle Facoltà speciali della Congregazione per il Clero," pp. 250-251.

ministry. Clearly, where other delicts may be verified, the ordinary must consider his obligations according to the norm of canon 1341.[57]

(b) The illicit absence must then be qualified as voluntary, that is to say an absence freely determined by the cleric himself. Other circumstances, whereby the cleric is illegitimately deprived of the exercise of the sacred ministry, or is permitted explicitly or implicitly to become a type of *vagus* or to pursue his own ends, do not fall within the *factispecies* envisioned by Special Faculty III. Troublesome clerics are to be dealt with in accord with the norm of law, with opportune precepts, warnings and suitable actions of an administrative and penal nature as the case demands, in accord with the norm of law. Special Faculty III, on the other hand, has been granted to address those many situations in which an ordinary has no effective means to supervise his cleric, especially where the penal route is impossible or unfeasible, where the cleric refuses to petition for dispensation from the obligations of his state, or whose condition of life is such that there is not the minimum of repentance or good will that would make such a dispensation truly suitable.[58]

(c) Finally, the period of absence is to be calculated as five consecutive years or more. In this regard, it will be important to be able to establish the date at which the cleric indicated in a clear and unequivocal fashion that he was withdrawing himself from the exercise of the sacred ministry, from obedience to his ordinary and his legitimate commands.

Naturally, it is to be presumed that an ordinary finding himself before such a cleric will have undertaken the necessary steps to dissuade the cleric from his course of action, will have provided for his canonical suspension after opportune warnings, will have removed all his faculties and will have issued a suitable precept, warning him of the possibility of further penal sanctions, not excluding dismissal from the clerical state. As previously mentioned, the possibility that the cleric will voluntarily petition for a dispensation from the obligations of his state is to be pursued within reason until it is and definitively excluded. As in all such circumstances, it is entirely reasonable and legitimate for the ordinary to establish a time limit within which to bring clarity to the cleric's situation and to have his response to the invitation to resolve his situation. From the text of the Circular Letter, it is abundantly clear that the Special Faculties are not intended to supplant the normal course of justice within the Church or to replace the already established

[57] Cf. PAPPADIA, "Ambito e procedimento di applicazione delle Facoltà speciali della Congregazione per il Clero," p. 251.

[58] Cf. ASTIGUETA, "Facoltà della Congregazione per il Clero," pp. 25-27.

routes for resolving the status of persons, such as the dispensation process. Along with what has already been observed concerning the principle of subsidiarity and the importance of preserving the integrity of the Supreme Authority of the Church, the universal discipline of the Church duly promulgated, studied and applied is the normal means of governing Christ's faithful.[59]

2.5.4 — *The Procedure to be Applied in Instructing Special Faculty III*

Given its singular novelty, the Circular Letter provides procedural norms in eight articles for the instruction of Special Faculty III, which are further elaborated in a more schematised format (Procedural Guidelines) in the subsequent Circular Letter issued to the Church's ordinaries on 17 March 2010 (Prot. N. 20100823).

(1) They specify that the ordinary of incardination alone is competent for the instruction of such cases; he may do so personally or through the appointment of a suitable instructor, appointed stably or *ad causam* (cf. art. 2).

(2) The promotor of justice must intervene, since it concerns a matter of the public good. He may be appointed *ad causam* or be convoked as the stably appointed promotor of justice in the diocesan tribunal (cf. art 3). The involvement of the promotor of justice ensures that justice is served and canonical equity has been observed.

(3) The ordinary must demonstrate with moral certainly that the cleric has indeed voluntarily abandoned the exercise of the sacred ministry as the Church understands and determines it for a period of five consecutive years or more. This may be done in the first place by the declarations of the cleric himself, ideally by providing a deposition properly and thoroughly prepared by the Instructor; failing this, there may be statements made by the cleric in authentic documents; witnesses should be interviewed concerning their knowledge of the cleric and his current manner of life.

(4) Finally, other corroborating evidence should be included in the *acta*. A thorough instructor will, of course, ensure that the cleric's period of ministry is presented in a fashion that leaves no lacuna in the evidence or questions concerning the reasons for the cleric's departure from the exercise of the sacred ministry. In like fashion, all relevant information

[59] Cf. GOŁAB, "Facultades especiales para la dimisión del estado clerical," pp. 677-678.

concerning his current manner of life ought to be included so as to leave no questions resting in the mind of the competent dicastery. This approach will be balanced by the fact that the procedure in question is not burdened with the need to prove a delict or its imputability to the cleric (cf. art. 3).

(5) Albeit that the procedure is not penal in nature, the Congregation insists, in a further element of caution, that the cleric have the opportunity of contesting the petition being made on his behalf. Consequently, it stands to reason not only that he be informed of the right of defence but that any relevant act communicated to him is done by a secure means, namely the postal service. Many ordinaries will take the sensible precaution of using registered mail, a method that facilitates an accurate record of the cleric's willingness to participate or the contrary (cf. art. 4).

(6) The experience of the instructor in preparing the submission is of particular merit in such cases. Thus his *votum* is required at that moment when the *acta* are delivered to the ordinary. It is the ordinary's duty, then, to satisfy himself concerning the facts of the case, the verification of the *factispecies* - namely illicit and voluntary absence from the exercise of the sacred ministry for a period of five consecutive years, and the impossibility or unfeasibility of the normal means at his disposal in the law to resolve such situations.

(7) In transmitting the *acta* to the Congregation for the Clergy, the ordinary will prepare his own *votum* reflecting the foregoing points, and clearly demonstrating the impossibility, unfeasibility or unsuitability of the ordinary means available to him in the law. He concludes by petitioning for the cleric in question to be dispensed from the obligations of the clerical state, including celibacy.

Conclusion

The loss of the clerical state, be it by punitive dismissal as in the case of the first two Special Faculties, or by dispensation as in the case of the third, comes about by the final confirmation on the part of the Supreme Pontiff *in forma specifica* of the decision of the Congregation of the Clergy. This decision is communicated to the interested party through his ordinary by means of rescript issued by the same Congregation. This in itself is a further demonstration of the nature of the Special Faculties, even in the case of penal dismissal: that a favour is also being communicated, namely dispensation from sacred celibacy. In this fashion, even where the cleric is dismissed

from the clerical state as penal act, it is intended that the person involved may yet think again about his situation and reconcile himself to the community of the Church, in this way also seeking the salvation of his own soul above every other good.[60] It is worth recalling that, by the nature of such a rescript, it has effect from the moment in which the decision is approved *in forma specifica* by the Holy Father. However, for him to benefit from the favour being held out to him, the interested party must accept in it in due manner, in this way being enabled to effect his reconciliation with God and with the Church. In the case of dismissal from the clerical state, the ordinary must prudently weigh the question of making this decision known to the ecclesiastical community, in order to assure its good order and to alleviate the confusion and scandal provoked by the cleric's actions.[61]

[60] Cf. GOŁAB, "Facultades especiales para la dimisión del estado clerical," p. 681.

[61] It may be opportune to note that even when a cleric has been dismissed from the clerical state, he may have committed or may persist in delicts for which calls upon the ordinary to undertake further action for the good of souls and the Church, for instance the declaration of excommunication where this is foreseen by the law etc. Dismissal from the clerical state does not necessarily address every aspect of the cleric's behaviour. This holds as much for the third Special Faculty as for the first two.

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THE PRIESTLY SOCIETY OF SAINT PIUS X: THE PAST, PRESENT, AND POSSIBILITIES FOR THE FUTURE

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SUMMARY — Since its establishment in 1970, the Priestly Society of Saint Pius X (SSPX) has been a source of considerable controversy due in large part to its opposition to elements of the Second Vatican Council. Tensions between the SSPX and the Holy See reached a highpoint when the founder of the SSPX, Archbishop Marcel Lefebvre, proceeded to ordain four bishops without a pontifical mandate in 1988, thus incurring a *latae sententiae* excommunication reserved to the Apostolic See. The excommunications of the four bishops illicitly consecrated were remitted in 2009, and doctrinal discussions between the Holy See and the SSPX commenced in earnest. The objective of this study is to provide an analysis of the canonical issues pertaining to the SSPX and the outstanding juridical obstacles to reconciliation. It begins by examining the juridic history of the SSPX and its members, particularly the consequences of the actions of its founder. Secondly, it examines the current status of the SSPX and the various efforts taken by the Holy See to achieve reconciliation. It concludes by evaluating various juridical remedies in the event that reconciliation is ultimately achieved.

RÉSUMÉ — Depuis sa création, en 1970, la Fraternité sacerdotale de Saint Pie X (FSSPX) n'a cessé de faire l'objet d'une énorme controverse en bonne part du fait de son opposition à certains éléments de l'héritage du deuxième concile du Vatican. Les tensions entre la FSSPX et le Saint Siège ont atteint leur paroxysme en 1988 lorsque le fondateur de la Fraternité, Mgr. Marcel Lefebvre, a décidé de procéder sans mandat pontifical à la consécration de quatre évêques, un acte pour lequel il a encouru une excommunication *latae sententiae* réservée au Saint Siège. Les excommunications des quatre évêques illicitement consacrés ont été levées en 2009 et le Saint Siège et la FSSPX ont alors entamé des discussions doctrinales en

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profondeur. L'objectif de la présente étude est d'offrir une analyse à la fois des questions canoniques relatives à la FSSPX et des obstacles juridiques qui demeurent sur la voie de la réconciliation. Elle commence par un examen de l'histoire juridique de la FSSPX et de ses membres, particulièrement en ce qui a trait aux conséquences des actes posés par son fondateur. Deuxièmement, on y détermine le statut actuel de la FSSPX et l'on rend compte des divers efforts déployés par le Saint Siège pour en venir à une réconciliation. Enfin, l'auteur conclut en évaluant les divers remèdes juridiques qui pourraient s'avérer utiles dans l'éventualité d'une telle réconciliation.

Introduction

Following the 2009 remission of excommunications of the four bishops illicitly ordained by Mgr Lefebvre in 1988, Benedict XVI expressed his sadness over the "avalanche of protests" and "open hostility" it generated in some quarters. Despite the many challenges to reconciliation, Benedict XVI nevertheless encouraged the Church to overlook past faults and to make up every effort to "open up broader vistas"—particularly in light of the size and significance of the Society of Saint Pius X (SSPX).

> Can we be totally indifferent about a community which has 491 priests, 215 seminarians, six seminaries, 88 schools, two university-level institutes, 117 religious brothers, 164 religious sisters and thousands of lay faithful? Shall we casually let them drift farther from the church? […] Can we simply exclude them as representatives of a radical fringe from our pursuit of reconciliation and unity? What would then become of them?[1]

Here, Benedict XVI is clearly fulfilling the important task of the Roman Pontiff to promote and safeguard the unity of the Church. Despite his best efforts, and those of his predecessors, most notably Paul VI and John Paul II, reconciliation with the SSPX has not been achieved and the possibility of such is unlikely to occur anytime soon. This matter is complex due in large part to attempts by the SSPX to obfuscate its actual juridical status, and in no small measure due to controversy generated by the remission of the excommunications in 2009. The objective of this brief study is to provide an analysis of the canonical issues pertaining to the SSPX and the outstanding juridical obstacles to reconciliation. We will begin by examining the juridic

[1] BENEDICT XVI, Letter to bishops on the lifting of the excommunication of Lefebvrite bishops, 10 March 2009, in *AAS*, 101 (2009), pp. 270-276, English translation in *Origins*, 38 (2008-2009), pp. 645-649, here p. 648.

history of the SSPX and its members, particularly the consequences of the actions of its founder, Mgr Lefebvre. Secondly, we will examine the current status of the SSPX and the various efforts taken by the Holy See to achieve reconciliation. Finally, in the third part, we will evaluate various juridical remedies in the event that reconciliation is ultimately achieved.

1 — *Juridic History of the Priestly Society of St. Pius X*

Marcel Lefebvre's ministry in Africa as a member of the Congregation of the Holy Spirit (Spiritans) eventually led to his appointment, in 1947, as Vicar-Apostolic of Dakar, Senegal, and, a year later, as Apostolic Delegate for the whole of French-speaking Africa. On 14 September 1955, Marcel Lefebvre was appointed the first Archbishop of Dakar.[2] In 1962, as Senegal was emerging from its colonial past, Mgr Lefebvre resigned as Archbishop to allow for the appointment of a native African, and was subsequently appointed Bishop of Tulle, France. A few months later, Mgr Lefebvre was elected Superior-General of the Congregation of the Holy Spirit, an office he held until his resignation in 1968.[3] In anticipation of the Second Vatican Council, Mgr Lefebvre was also appointed to the Central Preparatory Commission in 1959 by Pope John XXIII which was charged with drafting the schemata for consideration by the Council Fathers.[4] Despite this impressive resumé, Mgr Lefebvre is most remembered for his persistent opposition both during and after the Council, the foundation of the Priestly Society of Saint Pius X (*Fraternitas Sacerdotalis Sancti Pii X*), and for the events which led to his excommunication in 1988.

1.1 — Erection of the Priestly Society of Saint Pius X

By decree of Bishop François Charrière, Bishop of the Diocese of Lausanne, Geneva, and Fribourg, the SSPX was erected *ad experimentum* on 1 November 1970. The decree of erection reads as follows:

> Given the encouragement expressed by Vatican Council II, in the decree *Optatam totius*, concerning international seminaries and the distribution of clergy;

[2] See *Annuario Pontificio*, Typis Polyglottis Vaticanis, 1956, p. 199.

[3] See *Annuario Pontificio*, Typis Polyglottis Vaticanis, 1963, pp. 664, 827. For a comprehensive overview of Mgr Lefebvre's ministry in Africa, see P. LEVILLAIN, *Rome n'est plus dans Rome: Mgr Lefebvre et son église*, Paris, Perrin, 2010, pp. 106-173.

[4] See *AAS*, 52 (1960), p. 581.

> Given the urgent necessity for the formation of zealous and generous priests conforming to the directives of the cited decree;
>
> Confirming that the Statutes of the Priestly Society correspond to its goal:
>
> We, François Charrière, Bishop of Lausanne, Geneva, and Fribourg, the Holy Name of God invoked and all canonical prescriptions observed, decree what follows:
>
> 1. The "International Priestly Society of St. Pius X" is erected in our diocese as a "*Pia Unio*".
> 2. The seat of the Society is fixed as the Maison Saint Pie X, 50, rue de la Vignettaz, in our episcopal city of Fribourg.
> 3. We approve and confirm the Statutes, here joined, of the Society for a period of six years *ad experimentum*, which will be able to be renewed for a similar period by tacit approval; after which, the Society can be erected definitively in our diocese by the competent Roman Congregation.
>
> We implore divine blessings on this Priestly Society, this it may attain its principal goal which is the formation of holy priests.[5]

The decree presents several difficulties, due in large part to the imprecision of the text itself. Firstly, the decree invokes the conciliar decree *Optatam totius* as a justification for the erection of the SSPX. The decree *Optatam totius* concerns the training of priests and the revision of ecclesiastical

[5] « Étant donné les encouragements exprimés par le Concile Vatican II, dans le décret *Optatam Totius*, concernant les Séminaires internationaux et la répartition du clergé ;
étant donné la nécessité urgente de la formation de prêtres zélés et généreux conformément aux directives du décret suscité ;
constatant que les statuts de la Fraternité Sacerdotale correspondent bien à ces buts:
Nous, François Charrière, Évêque de Lausanne, Genève et Fribourg, le Saint Nom de Dieu invoqué, et toutes prescriptions canoniques observées, décrétons ce qui suit :
1. Est érigée dans notre diocèse au titre de *Pia Unio* la Fraternité Sacerdotale Internationale Saint Pie X.
2. Le siège de la Fraternité est fixé à la Maison Saint Pie X, 50 route de la Vignettaz, en notre ville épiscopale de Fribourg.
3. Nous approuvons et confirmons les statuts ci-joints de la Fraternité pour une période de six ans *ad experimentum*, période qui pourra être suivie d'une autre semblable par tacite reconduction ; après quoi la Fraternité pourra être érigée définitivement dans notre diocèse ou par la Congrégation Romaine compétente.

Nous implorons les bénédictions divines sur cette Fraternité sacerdotale afin qu'elle atteigne son but principal qui est la formation de Saints Prêtres.
See http://lacriseintegriste.typepad.fr/.a/6a01116874ffc7970c0111687a4153970c-popup. This English translation is taken from M. DAVIES, *Apologia pro Marcel Lefebvre, Part I, 1905-1976*, Dickinson, TX, Angelus Press, 1979, pp. 443-444 (=DAVIES, *Apologia pro Marcel Lefebvre*).

studies for seminarians. It does not, however, treat the topic of international seminaries or the proper distribution of priests. The decree of erection may have wished to refer to the decree *Presbyterorum ordinis*, n. 10, where this topic is considered more extensively.[6]

Secondly, the text of the decree seems to establish the International Priestly Society of St. Pius X—despite its optimistic name—as a pious union (*pia unio*) within the Diocese of Lausanne, Geneva, and Fribourg.[7] Pious unions are associations of the faithful that are erected for the exercise of some work of piety or charity (*CIC*/17, c. 707, §1). While a confraternity—a sodality erected for the increase of public cult (*CIC*/17, c. 707, §2)—is erected only through a decree of erection, the approval of the Ordinary suffices for a pious union. Once approval of the Ordinary is obtained, pious unions are capable of obtaining spiritual favours and indulgences, but they are not considered moral persons (*CIC*/17, c. 708). Adherents of Mgr Lefebvre have maintained that the SSPX was erected as a priestly society of common life without vows, in accordance with *CIC*/17, cc. 673-674, and 488, 3º-4º. The argument is based upon the content of the statutes which specified that the SSPX is a priestly society "of common life without vows, in the tradition of the Foreign Missionaries of Paris."[8] The decree, while erecting the SSPX as a *pia unio*, nevertheless confirms that the statutes of the SSPX correspond to its goals. This discrepancy has important juridic consequences. Once duly erected, a society of common life without vows, even of diocesan right, may only be suppressed by the Holy See (*CIC*/17, cc. 674, 493).

1.2 — The Suppression of the Priestly Society of St. Pius X

In response to growing tensions between Mgr Lefebvre and various concerned bishops, a special *ad hoc* commission of Cardinals was formed by

[6] SECOND VATICAN COUNCIL, Decree on the training of priests *Optatam totius*, 28 October 1965, in *AAS*, 58 (1966), pp. 713-727, English translation in FLANNERY1, pp. 707-724; SECOND VATICAN COUNCIL, Decree on the ministry and life of priests *Presbyterorum ordinis*, 7 December 1965, in *AAS*, 58 (1966), pp. 991-1024, English translation in FLANNERY1, pp. 863-902.

[7] For more details of Charrière's opposition to liturgical reform, see A. REID, *The Organic Development of the Liturgy*, San Francisco, Ignatius Press, 2005, pp. 256-258.

[8] A copy of the statutes is available at: http://lacriseintegriste.typepad.fr/weblog/1970/11/statuts-de-la-fraternit%C3%A9-sacerdotale-saintpiex.html. See also B.A. CATHEY, "The Legal Background to the Erection and Alleged Suppression of the Society of Saint Pius X," in DAVIES, *Apologia pro Marcel Lefebvre*, pp. 443-450. This is a rather moot point in light of its eventual suppression in 1975, as will be seen below.

Pope Paul VI to investigate the principal difficulties.[9] It was decided by this commission at a meeting on 23 June 1974 that a canonical visitation of the SSPX seminary in Ecône was required. The canonical visitation occurred on 11-13 November 1974 and occasioned, according to Mgr Lefebvre, his declaration of 21 November 1974. Mgr Lefebvre affirmed his refusal "to follow the Rome of Neo-Modernist and Neo-Protestant tendencies which became clearly manifest during the Second Vatican Council and after the Council in all the reforms which issued from it." The most problematic statements include the following.

> All these reforms have contributed and continue to contribute to the destruction of the Church, to the ruin of the priesthood, to the abolition of the Sacrifice of the Mass and the Sacraments, to the disappearance of the religious life, and to a naturalistic and Teilhardian education in the universities, in the seminaries, in catechetics, an education deriving from Liberalism and Protestantism which had been condemned many times by the solemn Magisterium of the Church. No authority, even the very highest in the hierarchy, can constrain us to abandon or diminish our Catholic Faith such as it has been clearly expressed and professed by the Church's Magisterium for nineteen centuries.[10]

This problematic declaration became the catalyst for the eventual suppression of the SSPX.

Following Mgr Lefebvre's abovementioned declaration, Mgr Mamie, Bishop of Lausanne, Geneva, and Fribourg, requested permission from the S.C. for Religious and Secular Institutes to withdraw the support given to

[9] Members of this special *ad hoc* commission included Gabriel-Marie Cardinal Garrone, the then-Prefect of the S.C. for Catholic Education and president of the Cardinalatial commission, John Cardinal Wright, the then-Prefect of the S.C. for the Clergy, and Arturo Cardinal Tabera, the then-Prefect of the S.C. for Religious and Secular Institutes. A detailed chronology of events concerning this commission and Mgr Lefebvre is provided in *La Documentation catholique*, 72 (1975), p. 612.

[10] « Nous refusons par contre et avons toujour refuse de suivre la Rome de tendance de néo-moderniste et néo-protestante qui s'est manifestée clairement dans le Concile Vatican II et après le Concile dans toutes les réformes qui en sont issue. Toutes ces réformes, en effet, ont contribué et contribuent encore à la démolition de l'Eglise, à la ruine du sacerdoce, à l'anéantissement du sacrifice et des sacrements, à la disparition de la vie religieuse, à un enseignement naturaliste et teilhardien dans les universités, les séminaires, la catéchèse, enseignement issu du libéralisme et du protestantisme condamné maintes fois par le Magistère solennel de l'Eglise. Aucune autorité, même la plus élevée dans la hiérarchie, ne peut contraindre à abandonner ou à diminuer notre foi catholique clairement exprimée et professée par le Magistère de l'Eglise depuis dix-neuf siècles. » See M. LEFEBVRE, Declaration, 21 November 1974, in *La Documentation catholique,* 72 (1975), pp. 544-545, English translation in DAVIES, *Apologia pro Marcel Lefebvre*, pp. 38-39.

the SSPX by his predecessor, Mgr Charrière.[11] In response to his request, Cardinal Tabera, the then-Prefect of the Congregation for Religious and Secular Institutes urged Mgr Mamie to proceed with suppression of the SSPX.[12] Confronted with Mgr Lefebvre's declaration of 21 November 1974 through which he refused to submit to the reforms of the Second Vatican Council and questioned the authority of the post-conciliar Church hierarchy, Mgr Mamie was presented with a grave cause (*causa gravis*) justifying the suppression of the SSPX, erected by his predecessor, Mgr Charrière. Mgr Lefebvre was informed of Mgr Mamie's decision to suppress the SSPX on 6 May 1975.[13]

A letter addressed to Mgr Lefebvre was also sent on 6 May 1975 in which the findings and decisions of the *ad hoc* Cardinalatial commission were made known. Recalling the difficulties noted above concerning Mgr Lefebvre's declaration of 21 November 1974, the *ad hoc* commission decided the following:

> Under such circumstances the Commission was left with no alternative but to pass on its absolutely unanimous conclusions to the Pope together with the complete dossier of the affair so that he could judge for himself. It is with the entire approval of His Holiness that we communicate the following decisions to you:
>
> 1) "A letter will be dispatched to Mgr. Mamie according him the right to withdraw the approval which his predecessor gave to the Fraternity and to its statutes." This has been done in a letter from His Excellency Cardinal Tabera, Prefect of the Congregation for Religious.
> 2) Once it is suppressed, the Society "no longer having a juridical basis, its foundations, and notably the Seminary at Ecône, lose by the same act the right to existence."
> 3) It is obvious—we are invited to notify it clearly—"that no support whatsoever can be given to Mgr. Lefebvre as long as the ideas contained

[11] P. MAMIE, Letter to the S.C. for Religious and Secular Institutes requesting permission to withdraw support for the SSPX, 24 January 1975, in *La Documentation catholique*, 72 (1975), p. 613.

[12] SACRED CONGREGATION FOR RELIGIOUS AND SECULAR INSTITUTES, Letter to Mgr Mamie concerning the suppression of the SSPX, 25 April 1975, in *La Documentation catholique*, 72 (1975), pp. 613-614.

[13] The letter includes an explicit revocation of the acts of Mgr Mamie's predecessor: « Je vous informe donc que je retire les actes et les concessions effectuées par mon prédécesseur en ce qui regarde la Fraternité sacerdotale Saint-Pie-X, particulièrement le décret d'érection du 1 novembre 1970 […] Cette décision est immédiatement effective. » See P. MAMIE, Letter to Mgr Lefebvre communicating his decision to suppress the SSPX, 6 May 1975, in *La Documentation catholique*, 72 (1975), p. 615.

> in the Manifesto of 21 November continue to be the basis for his work.'[14]

The first and second points noted above require special consideration. Firstly, the letter notes that Mgr Mamie had been accorded the right to withdraw approval of the SSPX. It is not entirely clear why this was required if, as the decree of erection states, the SSPX was erected as a pious union. In virtue of the law itself, a local Ordinary, for a grave cause, can suppress an association erected by himself or his predecessor (cf. *CIC*/17, c. 699, §1). If the SSPX was, in fact, erected as a society of common life without vows, as the statutes indicate, suppression could only occur by means of an intervention of the Holy See (*CIC*/17, c. 493).[15] As indicated above, the S.C. for Religious and Secular Institutes did intervene, delegating the faculty to suppress the SSPX to Mgr Mamie. In the end, whether the SSPX was erected as a *pia unio* or as a society of common life without vows is of no lasting juridic consequence. It was unquestionably and validly suppressed by means of the intervention of Mgr Mamie and the S.C. for Religious and Secular Institutes.[16]

[14] En ces conditions, la Commission ne pouvait que remettre au Saint-Père ses conclusions absolument unanimes et le dossier complet de cette affaire pour qu'il puisse juger lui-même. C'est avec l'entière approbation de Sa Sainteté que nous vous faisons part des décisions suivantes:

1. « Une lettre sera envoyée à Mgr. Mamie, lui reconnaissant le droit de retirer l'approbation donnée par son prédécesseur à la Fraternité et à ses statuts. » C'est chose faite par lettre de Son Eminence le cardinal Tabera, préfet de la S. congrégation pour les Religieux.
2. Une fois supprimée la Fraternité, celle-ci « n'ayant plus d'appui juridique, ses fondations, et notamment le séminaire d'Ecône, perdent du même coup le droit à l'existence. »
3. Il est évident—nous sommes invités à le notifier clairement—« qu'aucun appui ne pourra être donné à Mgr. Lefebvre tant que les idées continues dans le manifeste du 21 novembre 1974 resteront la loi de son action. » See SPECIAL *AD HOC* COMMISSION OF CARDINALS, Letter to Mgr Lefebvre, 6 May 1975, in *La Documentation catholique*, 72 (1975), p. 614, English translation in DAVIES, *Apologia pro Marcel Lefebvre*, pp. 57-59.

[15] Support for the SSPX position is found, years later, in the protocol agreement signed by Mgr. Lefebvre and the Holy See, which acknowledged that the SSPX was founded in 1970 as a "society of common life." The text of the protocol agreement was signed by Joseph Cardinal Ratzinger and Mgr Lefebvre on 5 May 1988. An English translation can be found in *Origins*, 18 (1988-1989), pp. 211-212.

[16] Maintaining that the SSPX had been erected as a priestly society of common life without vows, in accordance with *CIC*/17, cc. 673-674, and 488, 3º-4º, Cathey argues that Mgr. Mamie's act was invalid since the Holy See alone has the right to suppress such an institute in accordance with *CIC*/17, c. 493 (See B.A. CATHEY, "The Legal Background to the Erection and Alleged Suppression of the Society of Saint Pius X," in DAVIES, *Apologia pro Marcel Lefebvre*, pp. 443-450). This, of course, ignores the fact that such a faculty was delegated by the S.C. for Religious and Secular Institutes.

Secondly, the letter notes that once the SSPX has been suppressed, its foundations, and notably the Seminary at Ecône, lose by the same act the right to existence.[17] Although the decree of erection specifies that the principal goal of the SSPX is "the formation of holy priests," no provision is made for the erection of a seminary in Ecône. Indeed, Mgr Charrière could not have made this provision; Ecône is located within the Diocese of Sion and is, therefore, outside the jurisdiction of the Bishop of Lausanne, Geneva, and Fribourg.[18] Despite this, and prescinding from any consideration of whether the seminary in Ecône was formally erected, the statement of the Cardinalatial commission, 6 May 1975, affirms that the seminary loses its right to exist in virtue of the suppression of the SSPX by Mgr Mamie.

Mgr Lefebvre sought recourse against the decision of the *ad hoc* commission of Cardinals to the Apostolic Signatura on the basis of the three following objections:

1. Against the form in which the decisions were taken expressed in the letter of the 6 May 1975 as well by His Excellency Monseigneur Mamie, Bishop of Fribourg, as by the three Cardinals who signed the letter addressed to me from Rome. This form of procedure is contrary to Canon 493 of the *Codex Juris Canonici*.
2. Against the competence of the Commission of Cardinals which condemns me on a matter of faith, because of my Declaration which appeared in the review *Itinéraires* and which I wrote on 21 November 1974. I demand to be judged by the only Tribunal competent in these matters, the Sacred Congregation for the Doctrine of the Faith.
3. Against the sentence pronounced by Monseigneur Mamie and approved by the Cardinals of the Commission: in fact, my Declaration, if it deserves condemnation, should condemn me personally and not destroy the Fraternity, nor the Seminary, nor the houses that have been erected, the more so as the Cardinals assured me that the Apostolic Visitation had passed a favorable judgment on the work of the Seminary, the Visitation which took place on 11, 12, 13 November 1974.[19]

[17] In the 1917 Code of Canon Law, seminaries are included among the non-collegial *personae morales* (c. 99). According the 1983 Code, a seminary legitimately erected possesses juridic personality in the Church *ipso iure* (c. 238, §1).

[18] A letter from Mgr. Charrière to Mgr. Lefebvre specifies permission to open a house to receive priestly aspirants so that they may study at the University in Fribourg, not at Ecône. See F. CHARRIÈRE, Letter to Mgr. Lefebvre granting permission for a house of studies, 18 August 1970, in Y. MONTAGNE, *L'Évêque suspens: Mgr. Lefebvre*, Rome, Catholic Laymen's League, 1977, p. 28.

[19] « 1º Contre la forme dans laquelle ont été prises les décisions exprimées dans les lettres du 6 mai 1975 tant par S.E. Monseigneur Mamie, Evêque de Fribourg, que par les trois

The Apostolic Signatura responded quickly by rejecting Mgr. Lefebvre's request "after having noticed that, from the documents appended to the recourse, it is clear that the impugned action is nothing more than the execution of the decisions passed by a Special Commission of three Cardinals and approved in *forma specifica* by the Supreme Pontiff."[20] That the decision had been approved *in forma specifica* rendered the Apostolic Signatura absolutely incompetent to pass judgement on the proposed recourse in virtue of *CIC*/17, c. 1556, that is, the *Prima Sedes a nemine iudicatur*. Pope Paul VI confirmed his involvement personally in a letter to Mgr Lefebvre in which he states, "The Commission of Cardinals that We established have regularly and scrupulously reported to Us on its work. Finally, the conclusions which they proposed to Us, We made all and each of them Ours, and We personally ordered that they be immediately put into force."[21] As a result of this approval *in forma specifica*, Mgr Lefebvre was left with no

Cardinaux signataires de la lettre qui m'est adressée de Rome. Cette manière de procéder est contraire au Canon 493 du Codex Juris Canonici.
2º Contre la compétence de la Commission cardinalice qui me condamne en matière de foi, à cause de ma déclaration parue dans la revue « Itinéraires » et que j'ai écrite le 21 novembre 1974. Je demande à être jugé par seul Tribunal compétent en ces matières: la Sainte Congrégation pour la doctrine de la Foi.
3º Contre le jugement porté par S.E. Monseigneur Mamie et approuvé par les cardinaux de la Commission: en effet ma Déclaration, si elle est condamnable, devrait me condamner personnellement et no détruire la Fraternité, ni le séminaire, ni les maisons formées d'autant plus que les Cardinaux m'ont affirmé que la visite apostolique avait porté un jugement favorable à l'œuvre du séminaire, visite qui a eu lieu les 11-12-13 novembre 1974. » See Letter of Mgr Lefebvre to Cardinal Staffa, Prefect of the Apostolic Signatura, 21 May 1975, in Y. MONTAGNE, *L'Évêque suspens: Mgr. Lefebvre,* Rome, Catholic Laymen's League, 1977, pp. 125-126, English translation in DAVIES, *Apologia pro Marcel Lefebvre*, pp. 73-74.

20 The decree reads as follows: "Cum, per scriptum diei 21 maii 1975, apud Cancellariam Huius Supremi Tribunalis depositum, die 5 iunii 1975, Exc.mus D.nus Marcellus Lefebvre, Superior Instituti cui nomen « Fraternité Sacerdotale Saint Pie X », recursum interposuerit contra actum Exc.mi Episcopi Lausannen., Geneven. et Friburgen. diei 6 maii 1975, quo revocatur decretum erectionis eiusdem Fraternitatis;
Attento quod, ex documentis recursui adnexis apparet actum impugnatum non esse nisi exsecutionem decisionum latarum a Speciali Commissione trium Patrum Cardinalium, et a Summo Pontifice in forma specifica adprobatarum;
Supremi,m Signaturae Apostolicae Tribunal iuxta can. 1556 C.J.C., declarat *recursum propositum recipi non posse ob incompetentiam absolutam eiusdem Supremi Tribunalis*" (SUPREME TRIBUNAL OF THE APOSTOLIC SIGNATURA, Decree in response to Mgr Lefebvre's appeal, 10 June 1975, in *Periodica*, 65 [1976], pp. 183-185, English translation in *CLD*, 8, pp. 456-457).

21 « La commission cardinalice que nous avons instituée nous a régulièrement et scrupuleusement rendu compte de son travail. Enfin, les conclusions qu'elle nous a proposées, nous les avons faites nôtre toutes et chacune, et nous avons personnellement ordonné leur entrée

avenue for further recourse, as appeals are not possible against a sentence of the Supreme Pontiff himself or from the Apostolic Signatura (cf. *CIC*/17, c. 1880).

1.3 — Suspension *a divinis* of Mgr Lefebvre

Despite the formal suppression of the SSPX, the seminary at Ecône continued to accept candidates for ordination.[22] Until its formal suppression, all those studying at the SSPX seminary in Ecône and subsequently ordained were properly incardinated into the dioceses of bishops sympathetic to Mgr Lefebvre, in accordance with *CIC*/17, c. 111.[23] This was later discouraged as Jean Cardinal Villot, the then-Secretary of State, addressing himself to all Presidents of Episcopal Conferences, requested that all bishops refrain from incardinating into their dioceses any man illicitly ordained by Mgr Lefebvre and committed to service in the SSPX.[24] Ignoring the fact the SSPX was juridically suppressed, Archbishop Lefebvre announced his intention to ordain his seminarians and incardinate them into the SSPX.

en vigueur immédiate. » See PAUL VI, Letter to Mgr. Lefebvre, 29 June 1975, in *La Documentation catholique*, 73 (1976), pp. 33-34.

[22] Pope Paul VI, lamenting the absence of any expression of unreserved fidelity to the Vicar of Christ on the part of Mgr Lefebvre, indicates that far from renouncing any activity, Mgr Lefebvre had developed new projects. See PAUL VI, Letter to Mgr Lefebvre, 8 September 1975, in *La Documentation catholique*, 73 (1976), p. 34.

[23] Apparently, on three occasions, the Holy See allowed priests to be incardinated directly into the SSPX. Davies indicates that "the Vatican had permitted priests to be incardinated directly into the Fraternity on three separate occasions." Nevertheless, he acknowledges that "[u]p to and including the ordinations of 1975, all those ordained at Ecône had been properly incardinated into the dioceses of bishops sympathetic to Mgr. Lefebvre" (M. DAVIES, *Apologia pro Marcel Lefebvre, Part I, 1905-1976*, Dickinson, TX, Angelus Press, 1979, pp. 201-202). Cathey indicates the clerics of the SSPX were incardinated into the Diocese of Siguënza-Guadalajara, Spain (by Bishop Laureano Castans Lacoma), and the Diocese of St-Denis-de-la-Réunion, on the French island of Réunion in the Indian Ocean (by Bishop Georges-Henri Guibert, C.S.Sp.). See B.A. CATHEY, "The Legal Background to the Erection and Alleged Suppression of the Society of Saint Pius X," in DAVIES, *Apologia pro Marcel Lefebvre*, pp. 445.

[24] « Il est donc clair maintenant que la Fraternité sacerdotale Saint-Pie-X a cessé d'exister, que ceux qui s'en réclament encore ne peuvent prétendre—à plus forte raison—échapper à la juridiction des Ordinaires diocésains, enfin que ces mêmes Ordinaires sont gravement invités à ne pas accorder d'incardination dans leur diocèse aux jeunes qui déclareraient s'engager au service de la Fraternité ». SECRETARIAT OF STATE, Letter to Presidents of Episcopal Conferences concerning Mgr Lefebvre, 27 October 1975, in *La Documentation catholique*, 73 (1976), pp. 32-33.

Against this intention, the Secretariat of State provided the following instruction to the Apostolic Nuncio in Berne[25]:

> 1° You will hand over officially to Mgr. Lefebvre—who seemed to be absent from Switzerland on the 24 May—the Latin text and the French translation of the allocution given by His Holiness on the occasion of the recent secret Consistory of Cardinals, which all the bishops have already had opportunity of knowing.
>
> 2° You should, at the same time, inform Mgr. Marcel Lefebvre that, *de mandato speciali Summi Pontificis*, in the present circumstances and according to the prescriptions of canon 2373, 1°, of the Code of Canon Law, he must strictly abstain from conferring orders from the moment he receives the present injunction.
>
> 3° In the discourse to the Consistory on 24 May 1976, the Holy Father was at pains to recall, himself, the fraternal approaches he had several times tried to make to Mgr. Lefebvre. He has said repeatedly, and now says again, that he is ready to receive him as soon as he has given public testimony of his obedience to the present successor of Saint Peter and of his acceptance of Vatican Council II. The conditions are well known to Mgr. Lefebvre: they are still those which I specified to him, in the name of His Holiness, when we met on 19 March, and of which I reminded him in my letter of 21 April last.

The first and third points refer to the Consistory of Cardinals held on 24 May 1976 at which Pope Paul VI rebuked Mgr Lefebvre by name, thereby drawing attention to "the seriousness of his behavior, the irregularity of his principal present initiatives, the inconsistency and often falsity of the

[25] « 1° Vous remettrez officiellement à Mgr Lefebvre—qui semblait absent de Suisse à la date du 24 mai—le texte latin et sa traduction française de l'allocution que Sa Sainteté a prononcée à l'occasion du récent Consistoire secret des Cardinaux et que tous les Evêques ont déjà eu l'occasion de connaître.
2° Vous devrez en même temps faire savoir à Mgr Marcel Lefebvre que, *de mandato speciali Summi Pontificis*, dans l'état actuel des choses et demeurant fermes les dispositions du canon 2373, 1° du Code de droit canonique, il doit rigoureusement s'abstenir de conférer les ordres à partir du moment où il aura reçu la présente injonction.
3° Dans le discours du Consistoire du 24 mai 1976, le Saint-Père a tenu à rappeler lui-même les démarches fraternelles qu'il avait tentées à plusieurs reprises auprès de Mgr Lefebvre. Il a redit et il redit aujourd'hui sa disponibilité à accueillir celui-ci, dès qu'il aura donné un témoignage public de son obéissance au Successeur actuel de saint Pierre et de son acceptation de Concile Vatican II. Les conditions sont bien connues de Mgr. Lefebvre: elles demeurent celles que je lui avais moi-même précisées, au nom de Sa Sainteté, lors de notre entretien du 19 mars et que je lui ai rappelées dans ma lettre du 21 avril dernier. » This letter, 12 June 1976, is photostatically reproduced in Y. MONTAGNE, *L'Éveque suspens: Mgr. Lefebvre*, Rome, Catholic Laymen's League, 1977, pp. 197-198, English translation in DAVIES, *Apologia pro Marcel Lefebvre*, pp. 193-195.

doctrinal positions on which he bases this behavior and these initiatives, and the damage that accrues to the entire church because of them."[26] The second point recalls the prescription of *CIC*/17, c. 2373, 1°, whereby Mgr Lefebvre is instructed to abstain from conferring orders not only according to the prescripts of law but in observance of a special mandate given by the Supreme Pontiff himself.

Mgr Lefebvre responded to this warning by means of a letter to Pope Paul VI. In it he recalls the aspirations of his seminarians and the disappointment this will cause the seminarians and their families.[27] Pope Paul VI responded to Mgr Lefebvre by means of the Secretariat of State.

> The Holy Father charges me this very day to confirm the measure of which you have been informed in his name, *de mandato speciali*: you are to abstain, now, from conferring any order. Do not use as a pretext the confused state of the seminarians who were to be ordained: this is just the opportunity to explain to them and to their families that you cannot ordain them to the service of the Church against the will of the supreme Pastor of the Church. There is nothing desperate in their case: if they have good will and are seriously prepared for a presbyteral ministry in genuine fidelity to the Conciliar Church, one will find the best solution for them, but they must begin with an act of obedience to the Church.[28]

Despite canonical provisions, and a special mandate given by the Supreme Pontiff himself, on 29 June 1976 Mgr. Lefebvre proceeded to illicitly ordain seminarians to the priesthood. In accordance with *CIC*/17, c. 2373, Mgr. Lefebvre incurred a suspension *ab ordinum collatione*, that is, suspension from conferring orders for one year for violation of *CIC*/17,

[26] PAUL VI, Address to the Consistory of Cardinals, 24 May 1976, in *AAS*, 68 (1976), pp. 369-378, English translation in *Origins*, 6 (1976-1977), p. 63.

[27] M. LEFEBVRE, Letter to Pope Paul VI, 22 June 1976, photostatically reproduced in Y. MONTAGNE, *L'Éveque suspens: Mgr. Lefebvre*, Rome, Catholic Laymen's League, 1977, pp. 199-200.

[28] « Le Saint-Père me charge aujourd'hui même de confirmer la mesure qui vous a été intimée en son nom, *de mandato speciali*: vous abstenir actuellement de conférer toute ordination. Ne prenez pas prétexte du désarroi des séminaristes ordinands: c'est justement l'occasion de leur expliquer, ainsi qu'à leurs familles, que vous ne pouvez les ordonner au service de l'Église contre la volonté du Pasteur suprême de l'Église. Il n'y a rien de désespérant dans leur cas: s'ils sont de bonne volonté et sérieusement prépares à un ministère presbytéral dans la fidélité véritable à l'Église conciliaire, on se chargera de trouver ensuite la meilleure solution pour eux, mais qu'ils commencent d'abord, eux aussi, par cet acte d'obéissance à l'Église. » See SECRETARIAT OF STATE, Letter to Mgr Lefebvre, 25 June 1976, photostatically reproduced in Y. MONTAGNE, *L'Évêque suspens: Mgr. Lefebvre*, Rome, Catholic Laymen's League, 1977, pp. 200-202, English translation in DAVIES, *Apologia pro Marcel Lefebvre*, pp. 198-199.

c. 955, requiring every candidate to sacred orders to be ordained by his own proper bishop or with legitimate dimissorial letters received from him.[29]

In addition to the suspension incurred *ab ordinum collatione* in virtue of the law itself, the Sacred Congregation of Bishops issued an official monition, imploring Mgr Lefebvre to change his attitude, to ask pardon humbly of the Holy Father, and to repair the spiritual damage inflicted on the young men ordained and the scandal caused to the people of God.[30] The monition further warned that should Mgr Lefebvre fail to display some form of recognition of error within days of the receipt of the letter, the Sacred Congregation for Bishops would proceed by inflicting additional penalties in conformity with *CIC*/17, c. 2331, §1 in accordance with a special mandate given by the Roman Pontiff himself.[31]

Mgr Lefebvre's response was less than satisfactory. In his letter to Pope Paul VI, he urges the Holy Father to abandon the harmful undertaking of compromise which, he argues, has inflicted the Church. Far from the act of obedience intended by the Sacred Congregation of Bishops, Mgr Lefebvre's letter instead accuses the Pope Paul VI of unintentionally collaborating with modernism and Freemasonry for the purpose of destroying the Church.[32]

[29] The fact of this suspension was confirmed in a press release from the Holy See. See *La Documentation catholique*, 73 (1976), p. 715.

[30] « Aussi, par la présente monition, je vous conjure de changer d'attitude, de demander humblement pardon au Saint-Père, et de réparer le dommage spirituel infligé aux jeunes ordonnés et le scandale cause au Peuple de Dieu. » See SACRED CONGREGATION OF BISHOPS, Canonical monition to Mgr Lefebvre, 6 July 1976, photostatically reproduced in Y. MONTAGNE, *L'Éveque suspens: Mgr. Lefebvre*, Rome, Catholic Laymen's League, 1977, pp. 210-212.

[31] « Si pourtant l'invitation devait s'avérer vaine et si une preuve de résipiscence ne parvenait pas à cette Congrégation dans le délai le 10 jours qui suivra le moment où vous recevrez ma lettre, il faut que vous sachiez que, en se fondant sur un mandat spécial du Souverain Pontife, il sera du devoir de ce Dicastère de procéder à votre égard en vous infligeant les peines qui s'imposent, conformément au canon 2331, §1. » See SACRED CONGREGATION OF BISHOPS, Canonical monition to Mgr. Lefebvre, 6 July 1976, photostatically reproduced in Y. MONTAGNE, *L'Évêque suspens: Mgr. Lefebvre*, Rome, Catholic Laymen's League, 1977, pp. 210-212.

[32] « Que Votre Sainteté abandonne cette néfaste entreprise de compromission avec les idées de l'homme moderne, entreprise qui tire son origine d'une entente secrète entre de hauts dignitaires de l'Église et ceux des Loges Maçonniques, dès avant le Concile. » See M. Lefebvre, Letter to Pope Paul VI, 17 July 1976, in *Documentation catholique*, 73 (1976), pp. 811-812.

The Sacred Congregation of Bishops responded swiftly with the following notification:

> The Holy Father has informed me that he has received from you a letter dated 17 July. In his eyes, it could not unhappily be considered satisfactory—on the contrary. I may even tell you that he is very distressed by the attitude to him shown in that document. In consequence the Sovereign Pontiff Paul VI, on 22 July 1976, in conformity with canon 2227, in virtue of which the penalties that can be applied to a bishop are expressly reserved to him, has inflicted on you suspension *a divinis* provided for in canon 2279, §2, 2º, and has ordered that it take immediate effect.[33]

This suspension did not deter Lefebvre from the celebration of the sacraments, including holy orders, despite being forbidden from every act of the power of orders and the juridical suppression of the SSPX.

1.4 — Excommunication of Mgr Lefebvre

When Mgr Lefebvre announced his intention to ordain bishops, negotiations with the Holy See commenced in earnest.[34] As a precursor to further discussions and the possibility of regularization of the canonical status of the SSPX and its members, Mgr Lefebvre agreed to an apostolic visitation, which took place in November, 1987, and was conducted by Edward Cardinal Gagnon, the then-president of the Pontifical Council for the Family. Following this visitation, formal discussions took place between representatives of the Holy See and the SSPX, resulting in a protocol agreement that

[33] « Le Saint-Père m'a confié qu'il avait reçu, de votre part, une lettre datée du 17 juillet. A ses yeux, elle ne saurait malheureusement être considérée, bien au contraire, comme satisfaisante; je puis même vous dire qu'il est très affligé de l'attitude manifestée envers Lui dans cet écrit.
Par conséquent, Le Souverain Pontife Paul VI, en date du 22 juillet 1976 et conformément au canon 2227, §1, en vertu duquel les peines pouvant être appliquées à un Evêque lui sont expressément réservées, vous a infligé la *suspense 'a divinis'* prévue au canon 2279, §2, 2º, et a ordonné qu'elle prenne immédiatement effet. » See Sacred Congregation of Bishops, Notification of suspension *a divinis* to Mgr Lefebvre, 22 July 1976, photostatically reproduced in Y. MONTAGNE, *L'Éveque suspens: Mgr. Lefebvre*, Rome, Catholic Laymen's League, 1977, pp. 215-216, English translation in DAVIES, *Apologia pro Marcel Lefebvre*, pp. 235-236.

[34] This announcement was made in an ordination homily, 29 June 1987. A formal request "to consecrate some auxiliaries of our choice in order to give the Church the graces of Tradition" was made to Joseph Cardinal Ratzinger, 8 July 1987, the then-prefect of the Congregation for the Doctrine of the Faith. The texts of these letters can be found in F. LAISNEY, *Archbishop Lefebvre and the Vatican*, Kansas City, MO, Angelus Press, 1989, pp. 14-23 (=LAISNEY, *Archbishop Lefebvre and the Vatican*).

was signed by Mgr Lefebvre on 5 May 1988. The text of the agreement was divided into two principal sections: a doctrinal declaration and discussion of a variety of juridical questions. Although various formulae were considered, the following declaration was included in the protocol agreement:

> I, Marcel Lefebvre, archbishop – bishop emeritus of Tulle, along with the members of the Priestly Society of St. Pius X, which I founded:
>
> 1. We promise always to be faithful to the Catholic Church and to the Roman pontiff, its supreme pastor, the vicar of Christ, successor of the blessed Peter in his primacy and head of the body of bishops.
> 2. We declare the we will accept the doctrine contained in No. 25 of the Second Vatican Council's dogmatic constitution *Lumen Gentium* on the ecclesiastical magisterium and the adherence owed to it.
> 3. Regarding certain points taught by the Second Vatican Council or concerning subsequent reforms of the liturgy and law which appear difficult to reconcile with tradition, we commit ourselves to a positive attitude of study and of communication with the Apostolic See, avoiding all polemics.
> 4. We declare moreover that we will recognize the validity of the sacrifice of the Mass and of the sacraments celebrated with the intention of doing what the church does and according to the rites in the typical editions of the missal and rituals of the sacraments promulgated by Popes Paul V and John Paul II.
> 5. Lastly, we promise to respect the common discipline of the church and the ecclesiastical laws, particularly those contained in the Code of Canon Law promulgated by Pope John Paul II, except for the special discipline conceded to the fraternity by particular law.[35]

The protocol agreement also addressed a number of juridical matters, including the canonical structure to be given to the SSPX, the establishment of a new dicastery to deal with "eventual problems and contentions" pertaining to the SSPX, the juridic condition of the people linked to the SSPX, and provisions for the conferral of ordination. Acknowledging that the SSPX had been established as a society of common life in 1970, the agreement proposed the erection of the SSPX as a society of apostolic life of pontifical right, in accordance with cc. 731-746 of the 1983 Code of Canon Law. Societies of apostolic life resemble religious institutes inasmuch as their members live in common, yet without pronouncing religious vows (c. 731). A Roman commission was also to be established to address any difficulties.

[35] The text of the protocol agreement was signed by Joseph Cardinal Ratzinger and Mgr Lefebvre on 5 May 1988, in *La Documentation catholique*, 85 (1988), pp. 734-736. An English translation can be found in *Origins*, 18 (1988-1989), pp. 211-212.

The commission was to be comprised of a president, vice-president, and five members, two from the SSPX.

The agreement also addressed a number of immediate concerns, such as the lifting of the *suspension a divinis* of Archbishop Lefebvre, in effect since 1976, and the ordination of a bishop, chosen from among the ranks of the SSPX. Likewise, the agreement proposed an "amnesty" whereby a solution could be reached concerning the houses and places of worship, erected or used by the SSPX without the authorization of bishops. The agreement acknowledged that at the ecclesiological level, "the guarantee of stability and maintenance of the life and activity of the society is assured by its erection as a society of apostolic life of pontifical right and approval of its statutes by the Holy Father." Nevertheless, for "practical and psychological reasons," the Holy See was prepared to ordain a bishop, selected from among the priests of the SSPX, proposed by Mgr Lefebvre, and approved by the Holy Father. It was not foreseen that such a bishop would serve as superior general of the SSPX, but as a member of the newly constituted pontifical commission.

Despite affixing his signature to this agreement, Mgr Lefebvre, the following day, indicated his intention to proceed with the episcopal ordination of a member of the SSPX on 30 June 1988 by means of a letter to Joseph Cardinal Ratzinger.[36] This abrupt change of position necessitated additional exchanges between the two prelates. By means of a letter to Pope John Paul II, 2 June 1988, Lefebvre reiterated his position and additional demands. Denouncing the "false ecumenism" which is "leading the church to ruin and Catholics to apostasy," Lefebvre demanded assistance from hierarchical authorities to "guard against the spirit of Vatican II." Lefebvre makes two specific demands: (1) the ordination of "several bishops, chosen from within the tradition" and (2) a majority of members in the Roman commission, "so that we are protected against all compromise."[37]

John Paul II responded swiftly, acknowledging the "heartfelt and deep pain" that Lefebvre's letter caused. He continues:

> In your letter to me you appear to reject all that which was accomplished in the previous discussions, because you clearly show your intention to "provide yourself with the means for carrying on with your task," notably by going ahead very shortly and without an apostolic mandate with one or more episcopal ordinations, this being in flagrant contradiction not only to

[36] M. LEFEBVRE, Letter to Joseph Cardinal Ratzinger, 6 May 1988, in F. LAISNEY, *Archbishop Lefebvre and the Vatican*, Kansas City, MO, Angelus Press, 1989, pp. 83-84.

[37] M. LEFEBVRE, Letter to John Paul II, 2 June 1988, in LAISNEY, *Archbishop Lefebvre and the Vatican*, pp. 108-109.

> what is prescribed by canon law, but also to the protocol note signed May 5 and the indications relative to this problem contained in the letter Cardinal Ratzinger wrote to you May 30 at my request.
>
> With a paternal heart, but gravely concerned by the seriousness of the present circumstances, I exhort you, venerable brother, to give up your project which, if it were carried out, would only look like a schismatic act who inevitable theological and canonical consequences are already known to you. I ardently invite you to return, in humility, to full obedience to the Vicar of Christ.[38]

One last attempt to dissuade Mgr Lefebvre from proceeding with the illicit episcopal ordinations occurred by means of a telegram from Cardinal Ratzinger, wherein in invited Lefebvre to Rome "without proceeding to the episcopal ordinations of June 30 which you have announced"[39]

In the end, despite a formal canonical warning from the Congregation for Bishops,[40] Mgr Lefebvre proceeded to ordain four bishops without a pontifical mandate on 30 June 1988. In virtue of c. 1382, both the consecrating bishop and those receiving consecration from him incurred a *latae sententiae* excommunication reserved to the Apostolic See.[41] The effects of excommunication are specified in c. 1331, §1. This was formally declared on 1 July 1988:

> Archbishop Marcel Lefebvre, Archbishop-Bishop emeritus of Tulle, notwithstanding the formal canonical warning of last June 17 and the repeated

[38] JOHN PAUL II, Letter to Mgr Lefebvre, 9 June 1988, in *Origins*, 18 (1988-1989), pp. 100-101.

[39] JOSEPH CARDINAL RATZINGER, Telegram to Mgr Lefebvre, 29 June 1988, in *The Pope Speaks*, 33 (1988), p. 203.

[40] CONGREGATION FOR BISHOPS, Formal canonical monition to Mgr Lefebvre, 17 June 1988, in *La Documentation catholique*, 85 (1988), p. 740.

[41] Some defenders of Lefebvre have argued that full imputability could not be assigned to Mgr Lefebvre due to the existence of grave fear or necessity, thereby avoiding the *latae sententiae* penalty (cf. cc. 1323, 4º; c. 1324, §1, 5º, 8º, 10º; c. 1324, §3). See, for instance, C.P. NEMETH, *The Case of Archbishop Marcel Lefebvre: Trial by Canon Law*, Kansas City, MO, Angelus Press, 1994, pp. 91-111. The Pontifical Council for the Interpretation of Legislative Texts responded to such claims as follows: "In particular it does not seem that one may be able to find, as far as imputability of the penalty is concerned, any exempting or lessening circumstances (cf. CIC, can. 1323). As far as the state of necessity in which Mons. Lefebvre thought to find himself, one must keep before one that such a state must be verified objectively, and there is never a necessity to ordain Bishops contrary to the will of the Roman Pontiff, Head of the College of Bishops. This would, in fact, imply the possibility of "serving" the Church by means of an attempt against its unity in an area connected with the very foundations of this unity" (Explanatory note *Dal motu proprio*, 24 August 1996, in *Communicationes*, 29 (1997), pp. 239-243, English translation in *CLD*, 14, p. 1130).

> appeals to desist from his intention, has performed a schismatical act by the episcopal consecration of four priests, without pontifical mandate and contrary to the will of the Supreme Pontiff and has therefore incurred the penalty envisaged by canon 1364, §1 and canon 1382 of the *Code of Canon Law*.
>
> Having taken account of all the juridical effects, I declare that the abovementioned Archbishop Marcel Lefebvre and Bernard Fellay, Bernard Tissier de Mallerais, Richard Williamson and Alfonso de Galarreta have incurred ipso facto excommunication *latae sententiae* reserved to the Apostolic See.
>
> Moreover, I declare that Bishop Antonio de Castro Mayer, bishop emeritus of Campos, since he took part directly in the liturgical celebration as co-consecrator and adhered publicly to the schismatical act, has incurred excommunication *latae sententiae* as envisaged by canon 1364, §1.
>
> The priests and faithful are warned not to support the schism of Archbishop Lefebvre, otherwise they shall incur ipso facto the very grave penalty of excommunication.[42]

Interestingly, this declaration identifies two sources for the excommunication *latae sententiae*, an act of schism,[43] punishable by c. 1364, §1, and the unauthorized episcopal ordination, punishable by c. 1382. Since the excommunication was declared, the further restrictions identified in c. c. 1331, §2 also apply to those individuals identified above. Bishop Antonio de Castro Mayer, as a co-consecrator, also incurred an excommunication *latae sententiae* in virtue of c. c. 1364, §1, that is, adhering publicly to as schismatical act.[44]

[42] CONGREGATION FOR BISHOPS, Decree declaring the excommunication *latae sententiae* of Mgr Lefebvre and those he consecrated bishop, 1 July 1988, English translation in *CLD*, 12, pp. 804-805.

[43] Schism is defined in c. 751 as "the refusal of submission to the Supreme Pontiff or of communion with the members of the Church subject to him."

[44] Although not explicitly foreseen in c. 1382 itself or directly invoked by the Holy See in the case of Bishop Antonio de Castro Mayer, the Pontifical Council for Legislative texts recently clarified that co-consecrators are also subject to the penalty of c. 1382. "The delict punished by CIC canon 1382 is committed by the bishop who consecrates and the by the cleric who is consecrated. Moreover, inasmuch as episcopal consecration is a rite which usually involves the participation of several ministers, those who assume the task of co-consecrators by the imposition of hands and the recitation of the consecratory prayer (see *Caeremoniale episcoporum*, nn. 582 and 584) are co-authors of the offense and are equally subject to the penal sanction. This interpretation has also been confirmed by the tradition of the Church and its recent practice" (PONTIFICAL COUNCIL FOR LEGISLATIVE TEXTS, Declaration on the proper application of canon 1382 of the Code of Canon Law, 6 June 2011, n. 3, in J.A. RENKEN, *Particular Churches and the Authority Established in Them. Commentary on Canons 368-430*, Ottawa, Faculty of Canon Law, Saint Paul University, 2011, p. 332).

1.5 — Pontifical Commission *Ecclesia Dei*

On 2 July 1988, John Paul II, through his apostolic letter *motu proprio*, manifested his will to facilitate ecclesial communion with those faithful attached to an earlier liturgical and disciplinary form of the Latin tradition.[45] The *motu proprio Ecclesia Dei* states: "it is necessary that all the pastors and the other faithful have a new awareness, not only of the lawfulness but also the richness for the church of a diversity of charism, traditions of spirituality and apostolate, which also constitutes the beauty of unity in variety" (n. 5, a). The *motu proprio* encourages bishops to respect the feelings of all those who are attached to the Latin liturgical tradition, through "a wide and generous application" of the provisions in *Quattuor abhinc annos* (n. 6, c). To facilitate ecclesial communion with the former adherents of Mgr. Lefebvre and "to guarantee respect for their rightful aspirations" (n. 5, c), Pope John Paul II established the Pontifical Commission *Ecclesia Dei*.

> 6. Taking account of the importance and complexity of the problems referred to in this document, by virtue of my apostolic authority I decree the following:
>
> a) a *Commission* is instituted whose task it will be to collaborate with the bishops, with the Departments of the Roman Curia and with the circles concerned, for the purpose of facilitating full ecclesial communion of priests, seminarians, religious communities or individuals until now linked in various ways to the Fraternity founded by Mons. Lefebvre, who may wish to remain united to the Successor of Peter in the Catholic Church, while preserving their spiritual and liturgical traditions, in the light of the Protocol signed on 5 May last by Cardinal Ratzinger and Mons. Lefebvre;
>
> b) this Commission is composed of a Cardinal President and other members of the Roman Curia, in a number that will be deemed opportune according to circumstances;
>
> c) moreover, respect must everywhere be shown for the feelings of all those who are attached to the Latin liturgical tradition, by a wide and generous application of the directives already issued some time ago by the Apostolic See for the use of the Roman Missal according to the typical edition of 1962 (n. 6).[46]

In light of the particular tasks entrusted to it, the Pontifical Commission *Ecclesia Dei* was granted special faculties both to address the needs of the

[45] JOHN PAUL II, Apostolic Letter *motu proprio Ecclesia Dei*, 2 July 1988, in *AAS*, 80 (1988), pp. 1495-1498, English translation in *CLD*, 12, pp. 805-808.

[46] Ibid.

faithful attached to earlier liturgical forms and to facilitate full ecclesiastical communion with the followers of Mgr Lefebvre.[47] As such, the Pontifical Commission was given the faculty to permit priests the use of the 1962 *Missale Romanum* after having forewarned their diocesan bishop. To address matters concerning the former adherents of Mgr. Lefebvre and members of the SSPX, the Pontifical Commission was given the faculties to dispense from the irregularities to the exercise of orders received mentioned in c. 1044, §1, 1º and 2º, to grant a *sanatio in radice* to marriages lacking canonical form (cf. c. 1108), to erect the Priestly Fraternity of St. Peter as a society of apostolic life of pontifical right, and to erect with the consent of the diocesan bishop a seminary of the Fraternity of St. Peter in the Diocese of Augsburg. The Pontifical Commission was also granted the faculties to erect an institute of consecrated life or a society of apostolic life of pontifical right for communities *de facto* in existence, and which are committed to the use of former liturgical and disciplinary forms. Until otherwise determined, the Pontifical Commission *Ecclesia Dei* was to exercise vigilance over these same societies and associations in the name of the Holy See.[48]

1.6 — Explanatory Note on the Excommunication for Schism

The *motu proprio Ecclesia Dei* included an admonition to the adherents of the SSPX, warning that they, too, could incur an excommunication *latae sententiae*:

> In the present circumstances I wish especially to make an appeal both solemn and heartfelt, paternal and fraternal, to all those who until now have been linked in various ways to the movement of Archbishop Lefebvre, that they may fulfil the grave duty of remaining united to the Vicar of Christ in the unity of the Catholic Church, and of ceasing their support in any way for that movement. Everyone should be aware that formal adherence to the schism is a grave offence against God and carries the penalty of excommunication decreed by the Church's law.

The notion of "formal adherence" necessitated a clarification from the Pontifical Council for the Interpretation of Legislative Texts. The pontifical

[47] PONTIFICAL COMMISSION ECCLESIA DEI, *Rescriptum ex audientia Sanctissimi* concerning faculties entrusted to the Pontifical Commission, 18 October 1988, in *AAS*, 82 (1990), pp. 533-534, English translation in *CLSGBI Newsletter*, 77 (1989), pp. 19-20.

[48] For a helpful overview of these faculties and the conflict of competence they may present, see S.T. DOYLE, "The Pontifical Commission *Ecclesia Dei*: Purpose and Competence," in *The Jurist*, 73 (2013), pp. 131-150.

council clarified that "formal adherence" to schism implies two complementary elements:

a) one of internal nature, consisting in a free and informed agreement with the substance of the schism, in other words, in the choice made in such a way of the followers of Archbishop Lefebvre which puts such an option above obedience to the Pope (at the root of this attitude there will usually be positions contrary to the Magisterium of the Church).

b) the other of an external character, consisting in the externalising of this option, the most manifest sign of which will be the exclusive participation in the Lefebvrian "ecclesial" acts, without taking part in the acts of the Catholic Church (one is dealing however with a sign that is not univocal, since there is the possibility that a member of the faithful may take part in the liturgical functions of the followers of Lefebvre but without going along with their schismatic spirit).[49]

The same note also states that, for SSPX deacons and priests, "it seems certain that their ministerial activity within the schismatic movement is a very clear sign of the fact that the two requirements mentioned above […] are present and that there is therefore a formal adherence" (n. 6). Consequently, those who fulfill these conditions can be said to formally adhere to schism, and remain subject to the censure of excommunication *latae sententiae* (c. 1331 §1). As the explanatory note makes clear, occasional participation in the liturgical acts or activities of the SSPX does not necessarily constitute formal adherence to schism. One must consider the person's intentions and internal dispositions (n. 7).

2 — *Present Status*

Given Joseph Cardinal Ratzinger's direct dealing with the SSPX throughout his tenure as Prefect of the Congregation for the Doctrine of the Faith, it came as no surprise that within four months of his election as Supreme Pontiff, he responded favourably to Mgr Fellay's request to meet; the audience took place on 29 August 2005 at Castel Gondolfo. Mgr Fellay presented three requests: granting "full liberty" to the Tridentine Mass, to silence the accusation of schism by remitting the "alleged"

[49] PONTIFICAL COUNCIL FOR THE INTERPRETATION OF LEGISLATIVE TEXTS, Note concerning the excommunication incurred because of schism by followers of Lefebvre, 24 August 1996, in *Communicationes*, 29 (1997), pp. 241-243, English translation in *CLD*, 14, p. 1130.

excommunications, and finding an ecclesial structure for the "family of Tradition."[50] The Vatican press release following the meeting merely confirmed its "desire to proceed in stages and within reasonable time limits."[51] The Holy See did, in fact, proceed gradually, beginning with the promulgation of the *motu proprio Summorum Pontificum* in 2007, the remission of excommunications in 2009, and formal doctrinal discussions taking place between the Holy See and the SSPX from 2009 to 2012. Each of these will be examined in turn.

2.1 — *Summorum Pontificum*

By means of a 2007 apostolic letter *motu proprio*, *Summorum Pontificum*, Pope Benedict provided a significant revision of the provisions regulating the use of the 1962 *Missale Romanum* and the pre-conciliar rites for the sacraments of baptism, marriage, penance, anointing of the sick, and confirmation.[52] Priests are now free to use the 1962 *Missale Romanum* in Masses celebrated without a congregation without any need to obtain additional permission from their local ordinary or the Holy See. *Summorum Pontificum* replaces the earlier provisions of *Quattuor abhinc annos* of 1984[53] and John Paul II's 1988 apostolic constitution *Ecclesia Dei*, promulgated in response to the automatic excommunication incurred by Mgr Marcel Lefebvre and those he illicitly ordained.[54]

[50] « Enfin nous formulions nos demandes : changer le climat d'hostilité à l'égard de la Tradition, climat qui rend la vie catholique traditionnelle—y en a-t-il une autre ?—à peu près impossible dans l'Église conciliaire, en donnant une pleine liberté à la messe tridentine, faire taire le reproche de schisme en enterrant les prétendues excommunications, et trouver une structure d'Eglise pour la famille de la Tradition. » (« Entretien exclusif avec Mgr Fellay, » in *DICI*, no. 120 [17 September 2005], p. 3). The text can be found at http://www.dici.org/wp-content/uploads/pdf_dici/DICI_120.pdf and in English at http://www.dici.org/en/wp-content/uploads/pdf_dici/English_DICI_120.pdf.

[51] The press release of Joaquín NAVARRO-VALLS, 29 August 2005, stated: "Sebbene consapevoli delle difficoltà, si è manifestata la volontà di procedere per gradi e in tempi ragionevoli." See http://press.vatican.va/content/salastampa/it/bollettino/pubblico/2005/08/29/0443/01036.html.

[52] BENEDICT XVI, Apostolic letter *motu proprio Summorum Pontificum*, 7 July 2007, *AAS* 99 (2007) 777-781, English translation in *Origins* 37 (2007-2008) 129-132 (=*SP*).

[53] CONGREGATION FOR DIVINE WORSHIP, Circular letter on the use of the 1962 Roman Missal *Quattuor abhinc annos*, 3 October 1984, in *Communicationes*, 17 (1985), pp. 3-4, English translation in *CLD*, 11, pp. 3-4.

[54] JOHN PAUL II, Apostolic letter *motu proprio Ecclesia Dei*, 2 July 1988, in *AAS*, 80 (1988), pp. 1495-1498, English translation in *CLD*, 12, pp. 805-808.

In his accompanying letter to bishops, Benedict XVI identified the positive reasons for which he issued the *motu proprio*:

> I now come to the positive reason which motivated my decision to issue this Motu Proprio updating that of 1988. It is a matter of coming to an interior reconciliation in the heart of the Church. Looking back over the past, to the divisions which in the course of the centuries have rent the Body of Christ, one continually has the impression that, at critical moments when divisions were coming about, not enough was done by the Church's leaders to maintain or regain reconciliation and unity. One has the impression that omissions on the part of the Church have had their share of blame for the fact that these divisions were able to harden. This glance at the past imposes an obligation on us today: to make every effort to enable for all those who truly desire unity to remain in that unity or to attain it anew. […] Let us generously open our hearts and make room for everything that the faith itself allows.[55]

Benedict XVI's principal concern when issuing *Summorum Pontificum* was not the liturgical proclivities of individuals, but a desire to achieve an "interior reconciliation in the heart of the Church." By granting "full liberty" to the Tridentine Mass, as requested by the SSPX, Benedict was taking an important step to overcoming the "omissions" of the past so as to achieve reconciliation and restore full ecclesiastical communion with the SSPX.

2.2 — Remission of Excommunication

In response to repeated requests from the superior general of the SSPX, the excommunications of the four bishops illicitly consecrated by Mgr Marcel Lefebvre were remitted on 21 January 2009.[56] Regrettably, this act of "paternal compassion" was immediately overshadowed by a revelation of earlier unrelated remarks made by one of the bishops of the SSPX, Richard Williamson, concerning the Shoah.[57] Benedict XVI addressed a letter to all

[55] BENEDICT XVI, Letter to bishops accompanying the Apostolic Letter *Summorum Pontificum*, 7 July 2007, in *AAS,* 99 (2007), pp. 795-799, English translation in *Origins*, 37 (2007-2008), p. 133.

[56] CONGREGATION FOR BISHOPS, Decree remitting the excommunication of bishops consecrated by Lefebvre, 21 January 2009, in *Communicationes*, 41 (2009), pp. 94-95, English translation in *Origins*, 38 (2008-2009), pp. 533-534.

[57] After the Holy See became aware of Williamson's denial of the Shoah, the Secretariat of State issued a statement which indicated, among other things, the following: "The positions of Bishop Williamson with regard to the Shoah are absolutely unacceptable and firmly rejected by the Holy Father […] In order to be admitted to function as a bishop within the church, Bishop Williamson must also distance himself in an absolutely unequivocal and

bishops in which he acknowledged that his gesture of reconciliation was perceived as its very antithesis, that is,

> an apparent step backward with regard to all the steps of reconciliation between Christians and Jews taken since the council—steps which my own work as a theologian had sought from the beginning to take part in and support. That this overlapping of two opposed processes took place and momentarily upset peace between Christians and Jews as well as peace within the church is something which I can only deeply deplore.[58]

Benedict XVI later acknowledged that, had he known of the "particularly distressing circumstance" of Bishop Williamson, he would not have authorized the remission of his excommunication.[59] Williamson was eventually dismissed from the SSPX in October, 2012 for failing to show "due respect and obedience to his lawful superiors."[60]

The decree of remission does not identify, in explicit terms at least, the original cause for the excommunication, which was twofold.

> His Holiness Benedict XVI in his paternal concern for the spiritual distress which the parties concerned have voiced as a result of the excommunication, and trusting in their commitment, expressed in the aforementioned letter, to spare no effort in exploring as yet unresolved questions through requisite discussions with the authorities of the Holy See in order to reach a prompt, full and satisfactory solution to the original problem has decided to reconsider the canonical situation of Bishops Bernard Fellay, Bernard Tissier de Mallerais, Richard Williamson and Alfonso de Galarreta, resulting from their episcopal consecration.

public way from his positions regarding the Shoah, which were unknown to the Holy Father at the time of the remission of the excommunication" (SECRETARIAT OF STATE, Note concerning the remitting of excommunication of SSPX bishops, 4 February 2009, in *L'Osservatore Romano*, vol. 149, no. 29 [5 February 2009], p. 1, English translation in *Origins*, 38 [2008-2009], pp. 569-570).

58 BENEDICT XVI, Letter to bishops on the lifting of the excommunication of Lefebvrite bishops, 10 March 2009, in *AAS*, 101 (2009), pp. 270-276, English translation in *Origins*, 38 (2008-2009), pp. 645-649, here p. 646.

59 BENEDICT XVI, *Light of the World: The Pope, the Church, and the Signs of the Times. A Conversation with Peter Seewald*, M. MILLER and A.J. WALKER (trans.), San Francisco, Ignatius Press, 2010, p. 121 (=BENEDICT XVI, *Light of the World*). He likewise acknowledged that this matter was a public relations nightmare for the Holy See: "Incidentally, I must say that in this matter our public relations work was a failure. It was not explained adequately why these bishops has been excommunicated and why they now, for purely canonical reasons, had to be absolved from the excommunication" (Ibid., p. 22).

60 See "Communiqué of the General House of the Society of Saint Pius X (24 October 2012)," in *DICI*, n. 263 (26 October 2012), p. 2. This can be found at: http://www.dici.org/en/wp content/uploads/2012/10/DICI_263_english.pdf

It would seem that the decree has only considered one cause for excommunication, that arising from the authorized episcopal consecration (cf. c. 1382).[61] The decree of the Congregation for Bishops which declared the excommunication in 1988, along with John Paul II's *motu proprio Ecclesia Dei* rightly identified a second cause for the excommunication: an act of schism (cf. c. 1364, §1). Regardless of this omission, the excommunications incurred by these four bishops were remitted on 21 January 2009.[62] It was hoped that this act of "paternal compassion" would "consolidate reciprocal relations of trust" and "intensify and stabilize" the relationship between the SSPX and the Holy See.[63] In other words, this was an important step in regularizing the canonical status of the SSPX; it was not the conclusion of the process.

2.3 — Reconfiguration of the Pontifical Commission *Ecclesia Dei*

In his letter on the lifting of the excommunication of Lefebvrite bishops, Benedict XVI also expressed his intention to join the Pontifical Commission *Ecclesia Dei* to the Congregation for the Doctrine of the Faith. In so doing, Benedict XVI intended to make clear that the outstanding problems to be addressed with the SSPX "are essentially doctrinal in nature and concern primarily the acceptance of the Second Vatican Council and the post-conciliar

[61] This would be consistent with Benedict XVI's assessment of the excommunications: "Something out to be said here perhaps about the lifting of the excommunication itself. For an incredible amount of nonsense was circulated, even by trained theologians. It is not true that those four bishops were excommunicated because of their negative attitude toward Vatican II, as was often supposed. In reality they were excommunicated because they had received episcopal ordination without a papal mandate. It was handled according to the applicable canon of the old canon law then in force. According to that canon, those who consecrate others as bishops without a papal mandate and also those who are thus consecrated are to be excommunicated. They were excommunicated, therefore, because they violated papal primacy. […] In short: for the sole reason that they has been consecrated without a papal mandate they were excommunicated; and for the sole reason that they now pronounced an acknowledgment of the Pope—albeit not yet following him on all points—their excommunication was revoked" (BENEDICT XVI, *Light of the World*, pp. 21-22). For a thorough analysis of this statement and its canonical implications, see E.N. PETERS, "Benedict XVI's Remission of the Lefebvrite Excommunications: An Analysis and Alternative Explanation," in *Studia canonica*, 45 (2011), pp. 165-189.

[62] It would seem that the Congregation for Bishops intended a general remission of excommunication for the four bishops concerned, despite omitting specific reference to the initial causes of excommunication (cf. c. 1359).

[63] CONGREGATION FOR BISHOPS, Decree remitting the excommunication of bishops consecrated by Lefebvre, 21 January 2009, in *Communicationes*, 41 (2009), pp. 94-95, English translation in *Origins*, 38 (2008-2009), pp. 533-534.

magisterium of the popes."[64] Exactly twenty-one years after the erection of the Pontifical Commission *Ecclesia Dei*, Benedict XVI reconfigured the commission by means of *Ecclesiae unitatem*:

a) The president of the commission is the prefect of the Congregation for the Doctrine of the Faith.

b) The commission, with its own allocation of staff, is composed of the secretary and officials.

c) The task of the cardinal president, assisted by the secretary, is to refer the principal cases and doctrinal questions to the judgement of the Congregation for the Doctrine of the Faith through its ordinary procedures and to submit the results thereof to the superior dispositions of the supreme pontiff (n. 6).[65]

The Pontifical Commission *Ecclesia Dei* possesses ordinary vicarious power for the matters within its competence.[66] Thus, it continues to exercise the authority of the Holy See in supervising the observance and application of the dispositions of *Summorum Pontificum*, the *motu proprio* regulating use of the liturgical books of the *forma extraordinaria* (*SP*, art. 12). Consequently, it serves as hierarchical superior against any administrative acts contrary to the privisions of *Summorum Pontificum*. It also enjoys the faculties previously granted, although some are redundant in light of the new provisions of *Summorum Pontificum*.[67] The concession of additional faculties by the Roman Pontiff may be necessary, particularly in light of a possible reconciliation with the SSPX.[68]

[64] BENEDICT XVI, Letter to bishops on the lifting of the excommunication of Lefebvrite bishops, 10 March 2009, in *AAS*, 101 (2009), pp. 270-276, English translation in *Origins*, 38 (2008-2009), p. 647.

[65] BENEDICT XVI, Apostolic letter *motu proprio* reconfiguring the Pontifical Commission *Ecclesia Dei*, *Ecclesiae unitatem*, 2 July 2009, in *AAS*, 101 (2009), pp. 710-711, English translation in *Origins*, 39 (2009-2010), pp. 161-163. In virtue of the abovementioned *motu proprio*, William Cardinal Levada, and Archbishop Gerhard Müller, former and current prefect of the Congregation for the Doctrine of the Faith respectively, succeeded Darío Cardinal Castrillón Hoyos as president of the pontifical commission. The former secretary, Msgr. Camille Perl, was similarly succeeded by Msgr. Guido Pozzo. From 3 November 2012 until 3 August 2013, Archbishop Pozzo served as Almoner to His Holiness (http://www.news.va/en/news/94970). He was recently reappointed as Secretary of the Pontifical Commission *Ecclesia Dei* (See http://www.news.va/en/news/140044).

[66] See PONTIFICAL COMMISSION *ECCLESIA DEI*, Instruction on the application of *Summorum Pontificum*, *Universae Ecclesiae*, 30 April 2011, in *AAS*, 103 (2011), pp. 413-420, English translation in *Origins*, 41 (2011-2012), pp. 45-47, especially art. 9.

[67] See C.J. GLENDINNING, "Universae Ecclesiae: *Text and Commentary*," in *Studia canonica*, 45 (2011), pp. 360-363.

[68] The possibility for additional faculty was explicitly foreseen in *Summorum Pontificum*, art. 11. Benedict XVI also identified an additional responsibility for the Pontifical Commission

2.4 — Doctrinal Discussions

The remission of excommunications in 2009 was a first step to regularize the canonical status of the SSPX and the second request made by Mgr Fellay at his meeting with Pope Benedict in 2005. After all, the act was to signify the Holy See's desire to "consolidate reciprocal relations of trust," and to "intensify and stabilize" the relationship of the Society of St Pius X with this Apostolic See. As such, the outstanding doctrinal difficulties, noted above, needed to be addressed by means of additional dialogue. The first meeting between the Congregation for the Doctrine of the Faith and the SSPX took place on 26 October 2009.[69] A communiqué following this meeting was issued, stating in part:

> In a cordial, respectful and constructive climate, the main doctrinal questions were identified. These will be studied in the course of discussions to be held over coming months, probably twice a month. In particular, the questions due to be examined concern the concept of Tradition, the Missal of Paul VI, the interpretation of Vatican Council II in continuity with Catholic doctrinal Tradition, the themes of the unity of the Church and the Catholic principles of ecumenism, the relationship between Christianity and non-Christian religions,

Ecclesia Dei: "New saints and some of the new prefaces can and should be inserted into the old missal. The *Ecclesia Dei* commission, in contact with various bodies devoted to the *usus antiquior*, will study the practical possibilities in this regard" (BENEDICT XVI, Letter to bishops accompanying the Apostolic Letter *Summorum Pontificum*, 7 July 2007, in *AAS,* 99 [2007], pp. 795-799, English translation in *Origins*, 37 [2007-2008], p. 133). *Universae Ecclesiae*, art .11, provides a juridical formulation of this new responsibility: "After having received the approval from the Congregation for Divine Worship and the Discipline of the Sacraments, the Pontifical Commission *Ecclesia Dei* will have the task of looking after future editions of liturgical texts pertaining to the *forma extraordinaria* of the Roman Rite." A joint commission of experts from the Pontifical Commission *Ecclesia Dei* and the Congregation for Divine Worship and the Discipline of the Sacraments was formed in 2010 to discuss the possibility of these updates to the 1962 *Missale Romanum* (see *L'attività della Santa Sede 2010*, Vatican City, Libreria editrice Vaticana, 2011, p. 940).

[69] Participating on behalf of the Holy See included: Mons. Guido Pozzo, Secretary of the Pontifical Commission *Ecclesia Dei,* S.E. Mons. Luis F. Ladaria Ferrer, S.I., Secretary of the Congregation for the Doctrine of the Faith, and the following experts: Rev. P. Charles Morerod, O.P., Secretary of the International Theological Commission and consultor to the Congregation for the Doctrine of the Faith; Rev. Mons. Fernando Ocáriz, Vicar General of Opus Dei, consultor to the Congregation for the Doctrine of the Faith; and Rev. P. Karl Josef Becker, S.I., consultor to the Congregation for the Doctrine of the Faith. See http://attualita.vatican.va/sala-stampa/bollettino/2009/10/15/news/24488.html. Participating on behalf of the SSPX included: Bishop Alfonso de Galarreta**,** rector of the Nuestra Senora Corredentora Seminary at La Reja (Argentina); Fr. Benoit de Jorna, rector of the International Seminary of St. Pius X in Écône (Switzerland); Fr. Jean-Michel Gleize, professor of ecclesiology at the Écône seminary; and Fr. Patrick de La Rocque, prior of the St. Louis Priory in Nantes (France). See http://www.sspx.org/sspx_and_rome/press_release_10-15-2009_sspx_commission_members.htm.

> and religious freedom. The meeting also served to specify the method and organisation of the work.[70]

Between October 2009 and April 2011, eight such meetings took place to address these matters. A "doctrinal preamble" was then prepared and presented to the SSPX on 14 September 2011. The text of the "doctrinal preamble" has not been released, but a short description was provided at the time of its presentation to the SSPX:

> The Preamble defines certain doctrinal principles and criteria for the interpretation Catholic doctrine, which are necessary to ensure faithfulness to the Church Magisterium and *sentire cum Ecclesia*. At the same time, it leaves open to legitimate discussion the examination and theological explanation of individual expressions and formulations contained in the documents of Vatican Council II and later Magisterium.[71]

The SSPX's response was received in January 2012, and subsequently examined by the Congregation for the Doctrine of the Faith before being presented to the Holy Father for his judgement. On 16 March 2012, Mgr Fellay was informed that his response was "not sufficient to overcome the doctrinal problems which lie at the foundation of the rift between the Holy See and the Society of St. Pius X."[72] He was likewise invited to clarify his position. Mgr Fellay responded, as requested, on 17 April 2012.[73] The Congregation for the Doctrine of the Faith considered this response during an ordinary session of the dicastery on 16 May 2012,[74] and communicated its observations in person at a meeting between the Congregation for the Doctrine of the Faith and Mgr Fellay on 13 June 2012.

> The purpose of the meeting was to present the Holy See's evaluation of the text submitted in April by the Society of St. Pius X in response to the Doctrinal Preamble which the Congregation of the Doctrine of the Faith had presented to the Society on 14 September 2011. The subsequent discussion offered an opportunity [to] provide the appropriate explanations and clarifications. For his part, Bishop Fellay illustrated the current situation of the Society of St. Pius X and promised to make his response known within a reasonable lapse of time.[75]

The Congregation for the Doctrine of the Faith also presented Mgr Fellay with a draft document proposing the erection of the SSPX as a personal prelature in the event of establishing full ecclesiastical communion.

[70] http://press.vatican.va/content/salastampa/it/bollettino/pubblico/2009/10/26/0663/01551.html.
[71] http://www.news.va/en/news/communique-concerning-the-society-of-st-pius-x.
[72] http://www.news.va/en/news/communique-concerning-the-society-of-st-pius-x-2.
[73] http://www.news.va/en/news/communique-from-the-pontifical-commission-ecclesia.
[74] http://www.news.va/en/news/communique-on-the-society-of-st-pius-x-2.
[75] http://www.news.va/en/news/bishop-fellay-visits-the-congregation-for-the-doct.

The press release also stated that "the situation of the other three bishops of the Society of St. Pius X will be dealt with separately and singularly." Here, the Holy See was acknowledging divisions that were emerging within the SSPX, especially in light of reservations expressed by the other three bishops: Bishops Alfonso de Galarreta, Bernard Tissier de Mallerais, and Richard Williamson.[76] Clearly the Holy See did not want these voices of opposition to jeopardize the canonical regularization of the SSPX; they would thus be dealt with "separately and singularly."

In view of the increasing importance of these negotiations, the Holy Father appointed Archbishop Augustine Di Noia, O.P., then-secretary of the Congregation for Divine Worship and the Discipline of the Sacraments, as vice president of the Pontifical Commission *Ecclesia Dei*. As the Congregation for the Doctrine of the Faith noted on 26 June 2012, "[t]he appointment of a high-ranking prelate to this position is a sign of the Holy Father's pastoral solicitude for traditionalist Catholics in communion with the Holy See and his strong desire for the reconciliation of those traditionalist communities not in union with the See of Peter."[77] The office of "vice president" had not existed within the Pontifical Council *Ecclesia Dei*. The appointment of DiNoia, then, provides an example of an office that is both constituted and conferred at the same time (c. 145, §2).

2.5 — SSPX General Chapter

Gathered in a general chapter, 9-14 July 2012, delegates discussed, *inter alia*, the state of relations between the SSPX and the Holy See, including the "doctrinal preamble" and the offer of a personal prelature to facilitate full ecclesiastical communion. Although the statement issued by the general chapter continued to criticize the "novelties of the Second Vatican Council which remain tainted with errors, and also in regard to the reforms issued from it," it revealed that conditions have been approved for an eventual canonical normalization. Specifically, the SSPX "decided that, in that case, an extraordinary Chapter with deliberative vote will be convened beforehand."[78] The conditions for reconciliation were not identified in the chapter statement, but only afterwards in an internal letter written by Fr. Christian

[76] A copy of this letter, 7 April 2012, can be found at: http://lacriseintegriste.typepad.fr/.a/6a01116874ffc7970c01630570b565970d-popup.

[77] http://www.news.va/en/news/curia-abp-di-noia-moves-to-ecclesia-dei-commission.

[78] The full chapter statement, 14 July 2012, can be found in *DICI*, n. 258 (20 July 2012), pp. 8-9. It can also be found at: http://www.dici.org/en/wp-content/uploads/2012/07/DICI_258_1.pdf.

Thouvenot, General Secretary, to district superiors.[79] In it, Thouvenot identifies three *sine qua non* conditions, along with three desirable conditions (*conditions souhaitables*) to facilitate reconciliation with the Holy See:

1. Freedom to keep, transmit and teach the sound doctrine of the constant magisterium of the Church and of the immutable truth of divine tradition; freedom to defend , correct, reprove, even publicly, abettors of errors or novelties of modernism, liberalism, the Second Vatican Council, and their consequences;
2. To make use of the liturgy of 1962 exclusively; to keep the sacramental practice we presently have (including: orders, confirmation, marriage);
3. A guarantee of a least one bishop.[80]

The three desirable, though not essential, conditions consist of the following:

1. Its own ecclesiastical tribunal in the first instance;
2. Exemption of the houses of the Priestly Fraternity of Saint Pius X with regard to diocesan bishops;
3. A Pontifical Commission in Rome for Tradition, with dependence on the Pope, with a majority of members and presidency for Tradition.[81]

Despite these documents being made public, the Holy See has refrained from commenting, "but awaits the forthcoming official communication of the Priestly Society as their dialogue with the Pontifical Commission 'Ecclesia Dei' continues."[82] On 6 September 2012, the SSPX requested additional time for "reflection and study." The Pontifical Commission *Ecclesia Dei* responded:

> After thirty years of separation, it is understandable that time is needed to absorb the significance of these recent developments. As Our Holy Father Pope Benedict XVI seeks to foster and preserve the unity of the Church by

[79] A copy of the circular letter, 18 July 2012, can be found at: http://radiocristiandad.wordpress.com/2012/07/20/carta-circular-del-18-de-julio-por-el-padre-thouvenotcondiciones-puestas-a-roma-las-verdaderas/.

[80] « 1. Liberté de garder, transmettre et enseigner la saine doctrine du Magistère constant de l'Église et de la vérité immutable de la Tradition divine; liberté de défendre, corriger, reprendre, même publiquement, les fauteurs d'erreurs ou nouveautés du modernisme, du libéralisme, du concile Vatican II et de leurs conséquences; 2. User exclusivement de la liturgie de 1962. Garder la pratique sacramentelle que nous avons actuellement (y inclus : ordres, confirmation, mariage); 3. Garantie d'au moins un évêque ».

[81] « 1. Tribunaux ecclésiastiques propres en première instance; 2. Exemption des maisons de la Fraternité Sacerdotale Saint-Pie X par rapport aux évêques diocésains; 3. Commission Pontificale à Rome pour la Tradition en dépendance du Pape, avec majorité des membres et présidence pour la Tradition ».

[82] This was stated in a communiqué released by the Holy See on 19 July 2012: http://www.news.va/en/news/communique-concerning-priestly-society-of-st-pius.

> realizing the long hoped-for reconciliation of the Priestly Fraternity of St. Pius X with the See of Peter—a dramatic manifestation of the *munus Petrinum* in action—patience, serenity, perseverance and trust are needed.[83]

It appeared that discussions between the SSPX and the Holy See had reached a stalemate.[84] Following Benedict XVI's surprise *declaratio* of 10 February 2013, announcing his intended resignation of the Petrine office on 28 February 2013, the Holy See confirmed that Benedict XVI decided to entrust the matter of the SSPX to the next Pope; "a definition of relations with that society should not be expected by the end of this pontificate."[85] Since the election of Pope Francis, no significant developments have occurred pertaining to the juridic status of the SSPX or its relationship to the Holy See. In fact, in a declaration commemorating the twenty-fifth anniversary of the illicit episcopal consecrations, the remaining SSPX bishops—Fellay, Tissier de Mallerais, and Alfonso de Galarreta—renewed their criticism of the Second Vatican Council, not merely in "a bad interpretation of the conciliar texts—a 'hermeneutic of rupture' which would be opposed to a 'hermeneutic of reform in continuity'—but truly in the texts themselves, by virtue of the unheard of choice made by Vatican II."[86] Despite this, on 23 September 2014, a "cordial meeting" took place between Cardinal Gerhard Ludwig Müller, prefect of the Congregation for the Doctrine of the Faith, and Bishop Bernard Fellay.[87] The

[83] PONTIFICAL COMMISSION *ECCLESIA DEI*, Declaration, 27 October 2012, in http://www.news.va/en/news/full-text-declaration-of-the-pontifical-commission.

[84] In December 2012, Archbishop Di Noia, vice-president of the Pontifical Commission *Ecclesia Dei*, sent a letter to the members of the SSPX, acknowledging this delay. He reinforced the importance of Church unity and the need for continuing dialogue. The letter has not been officially released by either party, although its existence was confirmed by Mgr Fellay ("Letter to Friends and Benefactors," April 2013, in *DICI*, n. 274 (26 April 2013), p. 6 (see http://www.dici.org/en/wp-content/uploads/2013/04/DICI_274_english.pdf). See also J.-M. GUÉNOIS, "Rome tend de nouveau la main aux lefebvristes", 20 January 2013, in http://www.lefigaro.fr/actualite-france/2013/01/18/01016-20130118ARTFIG00650-rome-tente-une-nouvelle-mediation-avec-les-lefebvristes.php); A. TORNIELLI, "Lefebvians: Church extends a hand to the SSPX in an 8-page letter," 20 January 2013, in http://vaticaninsider.lastampa.it/en/the-vatican/detail/articolo/lefebvriani-lefebvrians-lefebvrianos-21496/); "In letter to SSPX, Vatican archbishop appeals for unity," 24 January 2013, in http://www.catholicnewsagency.com/news/in-letter-to-sspx-vatican-archbishop-appeals-for-unity/.

[85] http://www.news.va/en/news/popes-final-activities-possibility-of-a-motu-propr.

[86] The full declaration of the SSPX bishops, 27 June 2013, can be found at http://sspx.org/en/25th-anniversary-episcopal-consecrations.

[87] The meeting was also attended by Archbishop Luis Ladaria Ferrer, S.J., secretary of the Congregation for the Doctrine of the Faith, Archbishop Augustine Di Noia, O.P., adjunct secretary and Archbishop Guido Pozzo, secretary of the Pontificial Commision Ecclesia Dei, along with two assistants from the Society of St. Pius X, Rev. Niklaus Pfluger and Rev. Alain-Marc Nély.

communiqué following the meeting indicated that "various problems of a doctrinal and canonical nature were examined, and it was decided to proceed gradually and over a reasonable period of time in order to overcome difficulties and with a view to the envisioned full reconciliation."[88]

3 — *Possibilities for the Future*

When remitting the excommunications of the four SSPX illicitly ordained by Mgr Lefebvre, the Secretariat of State made it clear that "[t]he four bishops, even though they have been released from excommunication, have no canonical function in the church and do not licitly exercise a ministry within it."[89] In light of the confusion brought about by the remission of the excommunications, Benedict XVI clarified the status of the SSPX in a letter addressed to all bishops, in which he states:

> As long as the Society does not have a canonical status in the Church, its ministers do not exercise legitimate ministries in the Church. There needs to be a distinction, then, between the disciplinary level, which deals with individuals as such, and the doctrinal level, at which ministry and institution are involved. In order to make this clear once again: until the doctrinal questions are clarified, the Society has no canonical status in the Church, and its ministers—even though they have been freed of the ecclesiastical penalty—do not legitimately exercise any ministry in the Church.[90]

The bishops of SSPX, though validly ordained, do no legitimately exercise ministry in the Church since they are not in hierarchical communion with the head and members of the college of bishops (cf. cc. 336; 375, §2). At the very least, priests and deacons of the SSPX "do not legitimately exercise ministry in the Church" because they remain suspended *ipso facto* from the order received in virtue of c. 1383, that is, in violation of c. 1015, requiring every candidate to sacred orders to be ordained by his proper bishop or with legitimate dimissorial letters from him. More seriously, clerics of the SSPX may have incurred a *latae sententiae* excommunication in light of formal adherence to schism (c. 1364, §1). Recall that the Pontifical

[88] See http://www.news.va/en/news/congregation-for-the-doctrine-of-the-faith-cardina

[89] SECRETARIAT OF STATE, Note concerning the remitting of excommunication of SSPX bishops, 4 February 2009, in AAS, 101 (2009), pp. 145-146, English translation in *Origins*, 38 (2008-2009), pp. 569-570.

[90] BENEDICT XVI, Letter to bishops on the lifting of the excommunication of Lefebvrite bishops, 10 March 2009, in *AAS*, 101 (2009), pp. 270-276, English translation in *Origins*, 38 (2008-2009), pp. 645-649, here p. 647.

Council for Legislative Texts has stated that, for SSPX deacons and priests, it seems "certain" that "their ministerial activity within the schismatic movement" is a very clear sign of a formal adherence to schism (see 1.6 above).[91]

Although discussions are proceeding gradually and reconciliation of the SSPX and its members appears far from imminent, it is worth considering how regularization of the SSPX may be achieved should the opportunity present itself in the future. This process needs to be examined on two levels: the SSPX itself, which has no juridical existence in the Church, and the individual members of the SSPX, which are canonically irregular for the exercise of orders.

3.1 — Juridical Personality for the SSPX

When the SSPX was formally suppressed in 1975, it no longer had juridical recognition in the Church. This is still true today and any canonical regularization of the SSPX must deal with this reality. According to a communiqué from the Holy See, had the SSPX accepted the doctrinal preamble prepared and presented by the Congregation for the Doctrine of the Faith on 13 June 2012, the Holy See was prepared to erect the SSPX as a personal prelature "as the most appropriate instrument for any future canonical recognition of the Society."[92] This stands in rather stark contrast to a similar offer made in 1988. At that time, had Mgr Lefebvre not revoked his support from the protocol agreement he signed with Cardinal Ratzinger, the Holy See was prepared to erect the SSPX as a society of apostolic life of pontifical right.[93] Whether erected as a personal prelature or as a society of apostolic life, the SSPX would be guaranteed stability and granted juridical recognition in the Church.

[91] Although this excommunication of SSPX clerics has never been formally declared by the Holy See, this is no way negates the possibility of incurring a *latae sententiae* censure. For the juridic consequences of excommunication, see c. 1331. For a brief overview, see C.J. GLENDINNING, "Attendance at Masses Celebrated by Priests of the Society of St. Pius X," in S.A. EUART and S.M. VERBEEK (eds.), *Roman Replies and CLSA Advisory Opinions 2009*, Washington, DC, Canon Law Society of America, 2009, pp. 120-126.

[92] http://www.news.va/en/news/bishop-fellay-visits-the-congregation-for-the-doct.

[93] For a complete overview of this agreement, and the reasons for its failure, see 1.4 above.

3.1.1 — *Societies of Apostolic Life*

Societies of apostolic life resemble religious institutes of consecrated life. The principal difference is that members of societies of apostolic life do not profess public vows of poverty, chastity and obedience.[94] They nevertheless resemble religious institutes inasmuch as members share a common life and pursue the apostolic purpose proper to the society (c. 731, §1). In clerical societies of apostolic life, clerics are incardinated in the society itself unless the constitutions establish otherwise (c. 736, §2). Major superiors of clerical societies of apostolic life are ordinaries (c. 134). Consequently, they can confer the ministries of lector and acolyte (c. 1034, §2), and issue dimissorial letters for the ordination to the diaconate and priesthood to their subjects who are enrolled perpetually or definitely in the society (c. 1019, §1).

It would not have been unusual for the Holy See to have erected the SSPX as a society of apostolic life since the SSPX describes itself in just these terms. Although there is some discrepancy in the original decree of erection, as noted above, adherents of Mgr. Lefebvre have long maintained that the SSPX was erected as a priestly society of common life without vows, based on the fact that its statutes specify that the SSPX is a priestly society "of common life without vows, in the tradition of the Foreign Missionaries of Paris."[95] What the 1917 Code called "societies, whether of men or of women, living in common without vows" (cc. 673-674) are now called "societies of apostolic life" in the 1983 Code (cc. 731-746). To erect the SSPX as a society of apostolic life, then, would be entirely consistent with the original intention of Mgr Lefebvre and the stated purposes of the SSPX.

3.1.2 — *Personal Prelatures*

More recently, the Holy See has signaled its willingness to erect the SSPX as a personal prelature in the event of a formal reconciliation. A personal prelature is a relatively new structure in the Church and, ironically,

[94] Among the various societies of apostolic life, there are some in which members assume the evangelical counsels by some bond defined in the constitutions. These are not public vows of religious (cc. 654-658) or simply private vows (cf. cc. 1192 and 1196), but some other form of bond which is approved by the Church and regulated according to the constitutions.

[95] A copy of the statutes is available at: http://lacriseintegriste.typepad.fr/weblog/1970/11/statuts-de-la-fraternit%C3%A9-sacerdotale-saintpiex.html.

finds its origin in the Second Vatican Council. The first reference to such a structure is found in *Presbyterorum ordinis*, 10:

> Present norms of incardination and excardination should be so revised that, while this ancient institution still remains intact, they will better correspond to today's pastoral needs. Where a real apostolic spirit requires it, not only should a better distribution of priests be brought about but there should also be favored such particular pastoral works as are necessary in any region or nation anywhere on earth. To accomplish this purpose there should be set up international seminaries, special personal dioceses or prelatures (vicariates), and so forth, by means of which, according to their particular statutes and always saving the right of bishops, priests may be trained and incardinated for the good of the whole Church.

Following the Second Vatican Council, Paul VI issued the *motu proprio Ecclesiae Sanctae* which serves as an important source for the canons on personal prelatures in the 1983 Code.[96]

Personal prelatures are composed of clerics. They are erected for two broad purposes: "to promote a suitable distribution of presbyters or to accomplish particular pastoral or missionary works for various regions or for different social groups" (c. 294). Personal prelatures are erected by the Holy See, after the conferences of bishops involved have been heard (c. 294). Likewise, personal prelatures are governed by the statutes established by the Holy See (c. 295, §1), and presided over by a prelate as a proper ordinary. This prelate has various prerogatives in the 1983 Code itself, including the right to erect a national or international seminary; incardinate "students" (*alumnus*) (cf. c. 265);[97] and promote students to orders "under title of service to the prelature" (c. 295, §1). He must also provide for the spiritual formation for those he has promoted to the service of the prelature, and the decent support of those he has promoted (c. 295, §2). The statutes of the prelature will define how the prelature will relate with local ordinaries, and the previous consent of the diocesan bishop is required to exercise the prelature's pastoral or missionary works (c. 297).

One thing that sets personal prelatures apart from religious institutes or societies of apostolic life is the ability of lay persons to dedicate themselves to the "apostolic works" of a personal prelature by means of agreements (*conventiones*) entered into with the prelature. According to c. 296, "[t]he statutes, however, are to determine suitably the manner of this organic

[96] PAUL VI, Apostolic letter *motu proprio* on the implementation of the decrees of the Second Vatican Council *Ecclesiae Sanctae*, 6 August 1966, in *AAS*, 58 (1966), pp. 757-787, English translation in *CLD*, 6, pp. 264-298.

[97] Only clerics are incardinated through the reception of the diaconate (c. 266).

cooperation and the principal duties and rights connected to it." The SSPX has a number of lay adherents or supporters, including a third order. This arrangement is more akin to associations whose members share in the spirit of some religious institute (cf. c. 303), rather than the formal agreement contemplated in c. 296.[98]

According to the present configuration of the SSPX and its principal ends, it is not entirely clear why it should be erected as a personal prelature in the event of a formal reconciliation. By its own admission, it is comprised of clerics and resembles a society of apostolic life. It would seem that the only reason for erecting the SSPX as a personal prelature would be to ensure that it has a bishop member, as it has since its foundation by Mgr Lefebvre in 1970. A personal prelature provides no greater flexibility for the SSPX to pursue its ends, since it requires the previous consent of the diocesan bishop to exercise its pastoral or missionary works (c. 297). Similarly, if erected as a society of apostolic life of pontifical right, it remains subject to the diocesan bishop in those matters which regard public worship, the care of souls, and other works of the apostolate (c. 738, §2). In either case, the legitimate authority of the diocesan bishop is ensured.[99]

3.2 — Reconciliation of Members of the SSPX

The Christian faithful are always obliged to maintain communion with the Church (c. 209, §1). As the *Nota explicativa prævia*, 2 of *Lumen gentium* states, communion is not to be understood as "some kind of vague disposition, but as an organic reality which requires a juridical form and is

[98] The 1988 protocol agreement addressed the condition of peopled linked to the SSPX. Concerning men and women oblates, with or without private vows, and members of the Third Order linked to the SSPX, the agreement acknowledged that "they belong to an association of the faithful linked to the society in terms of Canon 303, and they collaborate with it" (n. 3.2).

[99] The 1983 Code provides an exception of sorts: "In order to provide better for the good of institutes and the needs of the apostolate, the Supreme Pontiff, by reason of his primacy in the universal Church and with a view to common advantage, can exempt institutes of consecrated life from the governance of local ordinaries and subject them to himself alone or to another ecclesiastical authority" (c. 591). Such an exemption was anticipated in the 1988 protocol agreement: "In its own statutes, with flexibility and creative possibility in light of the known models of these societies of apostolic life, one anticipates a certain exemption in regard to diocesan bishops (cf. canon 591) in what concerns public worship, the *cura animarum* and other apostolic activities, taking into account Canon 679-693" (n. 1). This provision could be given further elaboration in the decree of erection and statutes of the SSPX.

animated by charity."[100] In other words, communion with the Church is verified by the external bonds of profession of faith, the sacraments, and ecclesiastical governance (c. 205). Clerics of the SSPX are not in full communion with the Catholic Church as they refuse to submit to the authority legitimately exercised by the Roman Pontiff and college of bishops and accept some teachings of the Second Vatican Council. Pope Paul VI recognized these troubling developments in a letter to Mgr Lefebvre in 1976:

> What is indeed at issue is the question—which must truly be called fundamental—of your clearly proclaimed refusal to recognize, in its whole, the authority of the Second Vatican Council and that of the Pope. This refusal is accompanied by an action that is oriented towards propagating and organizing what must indeed, unfortunately, be called a rebellion. This is the essential issue, and it is truly untenable.[101]

Although the excommunications of the four bishops illicitly ordained by Archbishop Lefebvre have been remitted, this in no way alters the juridic status of the SSPX or the ministry exercised by its clerics. Consequently, any form of reconciliation must address the juridical condition of various members of the SSPX.

The approach of the Holy See has been to attempt to first overcome the doctrinal difficulties of the SSPX. In fact, the remission of excommunications in 2009 was a gesture of goodwill on the part of Benedict XVI to facilitate the establishment of full communion with the SSPX. As the decree remitting the excommunications states:

> It is hoped that this step be followed by the prompt accomplishment of full communion with the Church of the entire Fraternity of Saint Pius X, thus testifying true fidelity and true recognition of the Magisterium and of the authority of the Pope with the proof of visible unity.[102]

In both 1988 and 2012, following the close of these discussions, the Holy See presented the SSPX with a doctrinal declaration to be signed by members of the SSPX before proceeding with canonical regularization. The text of the latest doctrinal declaration has not been officially released, but the Holy See has indicated that "[a] full recognition of the Second Vatican

[100] The *Nota explicativa prævia* is attached to *Lumen gentium* in the official acts of the council as published in the *AAS*. The explanatory notes can be found in English in A. FLANNERY, *Vatican Council II*, vol. 1, new revised edition, 1996, pp. 424-426.

[101] PAUL VI, Letter to Archbishop Marcel Lefebvre *Cum te*, 11 October 1976, in *Notitiae*, 12 (1976), pp. 417-427, English translation in *Origins*, 6 (1976-1977), pp. 416-420.

[102] CONGREGATION FOR BISHOPS, Decree remitting the excommunication of bishops consecrated by Lefebvre, 21 January 2009, in *Communicationes*, 41 (2009), pp. 94-95, English translation in *Origins*, 38 (2008-2009), pp. 533-534.

Council and the magisterium of Popes John XXIII, Paul VI, John Paul I, John Paul II, and Benedict XVI himself is an indispensable condition for any future recognition of the Society of Saint Pius X."[103] The 1988 protocol agreement serves as appropriate template for the type of statement required to demonstrate true repentance and the withdrawal from contumacy (cf. cc. 1347, §2; 1358, §1).

> I, Marcel Lefebvre, archbishop-bishop emeritus of Tulle, along with members of the Priestly Society of St. Pius X, which I founded:
>
> 1. We promise always to be faithful to the Catholic Church and to the Roman Pontiff, its supreme pastor, the vicar of Christ, successor of blessed Peter in his primacy and head of the body of bishops.
> 2. We declare that we will accept the doctrine contained in no. 25 of the Second Vatican Council's dogmatic constitution *Lumen Gentium* on the ecclesiastical magisterium and the adherence owed it.
> 3. Regarding certain points taught by the Second Vatican Council or concerning subsequent reforms of the liturgy and law which appear difficult to reconcile with tradition, we commit ourselves to a positive attitude of study and of communication with the Apostolic See, avoiding all polemics.
> 4. We declare moreover that we will recognize the validity of the sacrifice of the Mass and of the sacraments celebrated with the intention of doing what the church does and according to the rites in the typical editions of the missal and rituals of the sacraments promulgated by Popes Paul VI and John Paul II.
> 5. Last, we promise to respect the common discipline of the church and the ecclesiastical laws, particularly those contained in the Code of Canon Law promulgated by Pope John Paul II, except from the special discipline conceded to the fraternity by particular law.[104]

Arguably, along with the acceptance of a doctrinal declaration such as this, clerics of the SSPX would need to receive a remission of the *latae sententiae* excommunication incurred due to formal adherence to schism (cf. c. 1364, §1). As well, those who commit the delict of schism, in addition to incurring a *latae sententiae* excommunication, become irregular for the reception and

[103] SECRETARIAT OF STATE, Note concerning the remitting of excommunication of SSPX bishops, 4 February 2009, in *AAS*, 101 (2009), pp. 145-146, English translation in *Origins*, 38 (2008-2009), pp. 569-570.

[104] An English translation of this agreement can be found in *Origins*, 18 (1988-1989), pp. 211-212.

exercise of Holy Orders (cc. 1041, 2º; 1044, §1, 2º).[105] Although the Code of Canon Law does not reserve the remission of this penalty[106] or dispensation from this irregularity to the Apostolic See (cf. c. 1047),[107] the Holy See has reserved to itself the canonical regularization of clerics ordained for the SSPX and wishing to return to active ministry under the authority of legitimate Pastors:

> While the current canonical norm allows each bishop to handle directly the process of reconciliation in cases such as these, the Congregation [for the Doctrine of the Faith] has decided it must maintain the actual practice which requires recourse to the Holy See. Such a decision, in fact, was reached by the Cardinal Members of the Congregation at their meeting of January 14, 1987. This decision was later confirmed by the Holy Father.[108]

A remission from the *latae sententiae* excommunication incurred due to formal adherence to schism (c. 1364, §1), along with a dispensation from the corresponding irregularity (c. 1044, §1, 2º), then, would be granted by the Holy See.[109]

[105] Irregularities and impediments are juridical obstacles to the reception of orders (c. 1041) and the exercise of orders received (c. 1044). They exist not to punish an individual, but to ensure the worthiness of the minister and the protection of the common good.

[106] The delicts of heresy, apostasy and schism are reserved to the Congregation for the Doctrine of the Faith. Nevertheless, the present norms concerning *graviora delicta* state the following:

> Art. 2, §1. The delicts against the faith referred to in art. 1 are heresy, apostasy and schism according to the norm of can. 751 and 1364 of the Code of Canon Law, and can. 1436 and 1437 of the Code of Canons of the Eastern Churches.
>
> "§2. In the abovementioned cases referred to in §1, it pertains to the Ordinary or Hierarch to remit, by norm of law, if it be the case, the *latae sententiae* excommunication and likewise to undertake a judicial trial in the first instance or issue an extrajudicial decree, with due regard for the right of appeal or of recourse to the Congregation for the Doctrine of the Faith.

(CONGREGATION FOR THE DOCTRINE OF THE FAITH, *Rescriptum ex audientia Sanctissimi* introducing revisions to the norms *de gravioribus delictis*, 21 May 2010, in *AAS*, 102 [2010], pp. 419-430). Consequently, it is only in the event of appeal or recourse against the decision of the Ordinary that such matters are reserved to the Congregation for the Doctrine of the Faith.

[107] Dispensation from the *public* delict of apostasy, heresy, and schism, is reserved to the Apostolic See for the *reception* of orders (c. 1047, §2, 1º), but not for the *exercise* of orders already received (c. 1047, §3).

[108] APOSTOLIC PRO-NUNCIO TO THE UNITED STATES OF AMERICA, Letter to president of NCCB, 12 February 1987, in *CLD*, 12, p. 671.

[109] The Pontifical Commission *Ecclesia Dei* was explicitly granted the faculty to dispense from the irregularities mentioned in c. 1044, §1, 1º and 2º (see 1.5 above).

Every cleric must be incardinated either in a particular church or personal prelature, or in an institute of consecrated life or society endowed with this faculty (cf. c. 265). Clerics belonging to the SSPX, following their reconciliation with the Church, would be presumably incardinated in the SSPX itself, whether erected as a personal prelature or as society of apostolic life of pontifical right. Following its juridical establishment, all newly ordained clerics would be incardinated *ipso iure* into the newly erected structure, unless the constitutions determine otherwise (c. 266). Consequently, we can identify four distinct juridical actions required to regularize validly ordained clerics of the SSPX following their profession of faith and acceptance of a doctrinal preamble, whereby the most controverted doctrinal and disciplinary points are resolved. The four distinct, yet likely simultaneous, acts on the part of the Holy See include: (1) the remission of the suspension incurred *ipso facto* in violation of c. 1383, that is, receiving ordination without legitimate dimissorial letters; (2) the remission of excommunication *latae sententiae* due to formal adherence to schism; (3) a dispensation from any and all irregularities to the exercise of orders; and (4) incardination. By means of these complimentary acts, clerics of the SSPX would be restored to full communion with the Catholic Church, and would thereby become regular for the exercise of orders already received.

Conclusion

Despite concerted efforts to overcome doctrinal differences with the SSPX during the Pontificates of Paul VI, John Paul II and, most recently, Benedict XVI, reconciliation has not been achieved and the mere possibility of such remains a divisive prospect within the SSPX itself. If the latest attempt at overcoming doctrinal differences is any indication, a wholesale reconciliation with the SSPX is improbable. It has been nearly forty years since the SSPX was formally suppressed and many of its younger members have no recollection of full communion with the Catholic Church, having been baptized and raised outside its visible structures. A more likely scenario would see those inclined to overcome the existing doctrinal and juridical obstacles to seek reconciliation, either individually or collectively, such as in the manner of the Priestly Fraternity of Saint Peter (FSSP) following the illicit consecrations of 1988.

The Holy See has indicated that it is prepared to erect the SSPX as a personal prelature. This, or any other equivalent structure, would provide the

juridical recognition removed in 1975 and provide a suitable structure for incardination of regularized clerics of the SSPX. Before this can occur, however, the outstanding doctrinal difficulties—the interpretation of Vatican Council II, ecumenism, interreligious dialogue, and religious freedom—must be satisfactorily addressed, for, as Benedict XVI remarked, "[t]he Church's teaching authority cannot be frozen in the year 1962."[110] Although two of the three requests made by Mgr Fellay in 2005 have already been achieved by means of *Summorum Pontificum* in 2007 and the remission of excommunications in 2009, the remaining request—finding an ecclesial structure for the "family of Tradition"—remains unlikely until these outstanding doctrinal obstacles to reconciliation are resolved. While these remain, the SSPX finds itself in the peculiar and untenable position of professing faithfulness to a "Tradition" which is opposed the universal Magisterium of the Church exercised by the Roman Pontiff—"the supreme pastor and teacher of all the Christian faithful" (c. 749, §1)—and the college of bishops. As John Paul II remarked in his *motu proprio Ecclesia Dei*, "[i]t is impossible to remain faithful to the Tradition while breaking the ecclesial bond with him to whom, in the person of the Apostle Peter, Christ himself entrusted the ministry of unity in his Church."[111] "[T]he long hoped-for reconciliation of the Society of St. Pius X with the See of Peter"[112], then, is an extension of the Church's perennial concern to preserve and restore unity among all the followers of Christ, fulfilling Christ's own prayer to the Father: *Ut unum sint* (John 17:21).

[110] BENEDICT XVI, Letter to bishops on the lifting of the excommunication of Lefebvrite bishops, 10 March 2009, in *AAS*, 101 (2009), pp. 270-276, English translation in *Origins*, 38 (2008-2009), pp. 645-649, here p. 647.

[111] JOHN PAUL II, Apostolic Letter *motu proprio Ecclesia Dei*, 2 July 1988, n. 4, in *AAS*, 80 (1988), pp. 1495-1498, English translation in *CLD*, 12, pp. 805-808.

[112] PONTIFICAL COMMISSION *ECCLESIA DEI*, Declaration, 27 October 2012, in http://www.news.va/en/news/full-text-declaration-of-the-pontifical-commission

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THE THREEFOLD POWER OF GOVERNANCE

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SUMMARY — Unlike the modern constitutional theory of the separation of governing powers, Canon Law operates with a threefold expression of the one power of governance (*potestas regiminis*). In the Code of 1983, this principle is enshrined in canon 135, which also provides the basic parameters for the exercise of legislative, executive, and judicial power in the life of the Church. This article seeks to present this threefold expression through a study of the canon and its sources; the three concrete expressions (legislative, executive, and judicial power); as well as discussing the similarities and differences between the three.

RÉSUMÉ — À la différence de la doctrine constitutionnelle moderne de séparation des trois pouvoirs de gouvernement, le droit canonique opère dans le cadre d'une triple expression d'un seul et même pouvoir de gouvernement. Dans le Code de 1983, ce principe est enchâssé dans le canon 135, lequel définit également les paramètres fondamentaux de l'exercice du pouvoir législatif, exécutif et judiciaire dans la vie de l'Église. Le présent article se propose de considérer la triple expression du pouvoir en question au moyen d'une étude de ce canon, de ses sources et des trois expressions concrètes des pouvoirs (pouvoir législatif, exécutif et judiciaire), ainsi que d'une discussion des ressemblances et des différences entre ces dernières.

Introduction

Canon 135[1] of the revised Code establishes that the canonical legal system includes a functional threefold expression of the power of governance. There is, in other words, one governing power that is expressed in the life of

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[1] §1. The power of governance is divided into legislative, executive, and judicial power.
§2. Legislative power is to be exercised in the manner prescribed by law; that which in the Church a legislator lower than the supreme authority has, cannot validly be delegated,

the Church as legislative power, executive power or judicial power. This clearly sets Canon Law apart from the division of governing powers in the modern constitutional state which, based on the (general) theories of J. Locke and C. Montesquieu, operates with three such governing powers: a legislative power vested in parliament, an executive power vested in a monarch or president, and a judicial power vested with the courts.

The unity and fullness of the one *potestas regiminis* in the Church, vested in the Pope and college of bishops for the universal Church and the diocesan bishop for the particular Church, is not divided with this threefold expression, but rather underlined by it. This as canon 135 states that governing power "distinguitur in legislativam, exsecutivam et iudicialem." The Latin *distinguitur* (translated as *is divided into* in the British English version Code of Canon Law) denotes not so much a division between different entities but a distinction between various expressions of one entity. As such, a more precise translation in this context would have been *is distinguished in*.

1 — *Canon 135: Development and Sources*

During the revision process the canons that would eventually be merged into canon 135 were dealt with by the study group entitled *On General Norms*. The first discussion on this particular section of the Code took place in the third session of this study group from 26 November to 1 December 1979. The relevant material was at the time covered by two different canons. The first was given as canon 100, specifying the threefold distinction of the power of governance using the Latin *distinguitur* in §1[2] and the two subspecies of executive power: voluntary (*gratiosa*) and contentious (*contentiosa*) power in §2. The second canon (numbered as canon 102) consisted of three paragraphs on the three expressions: one paragraph for each of them. During the following discussion it was agreed that the two canons

unless the law explicitly provides otherwise. A lower legislator cannot validly make a law which is contrary to that of a higher legislator.

§3. Judicial power, which is possessed by judges and judicial colleges, is to be exercised in the manner prescribed by law, and it cannot be delegated except for the performance of acts preparatory to some decree or judgement.

§4. As far as the exercise of executive power is concerned, the provisions of the following canons are to be observed This article seeks to explore the threefold power of governance by studying this crucial canon, its foundation in principle 7 on the revision of the Code, and the main characteristics of these three expressions.

[2] Cf. *Com* 23 (1991), p. 223.

should be merged and that the second paragraph of canon 100 on the two subspecies of executive power should be deleted.[3] Therefore, the approved canon of this session (listed as canon 102) consisted of four paragraphs that were largely identical with the promulgated canon.[4] The result was an initial paragraph giving the legal principle and three subsequent paragraphs outlining certain key elements of these three functions of the *potestas regiminis*.

The inclusion of canon 135 in the revised Code made the principle of the threefold expression of the power of governance much more precise than it had been in *CIC 1917*, and for two reasons. Firstly, with canon 135 §1 the functional expression of governing power in the Church is established as a general canonical principle, something the Pio-Benedictine Code did not do. Secondly, whereas the old Code only made use of the threefold expression (in legislative, executive, and judicial) in relation to the diocesan bishop (*CIC*/17, c. 355 §1),[5] the new Code made the threefold governing power of the diocesan bishop the application of the principle in canon 135 §1, stating in canon 391 §1 that: "The diocesan bishop governs the particular Church entrusted to him with legislative, executive, and judicial power, in accordance with the law." There is, therefore, a clear link between canon 135 §1 and §§2-4 on the one hand, and canon 391 §1 and §2 on the other. The first paragraph in each canon articulates the distinction—the threefold expression—of the power of governance in general (c. 135) and in relation to the diocesan bishop (c. 391), whereas the subsequent paragraphs outline the provisions for each of the three expressions and who may exercise them (cc. 135 §§2-4; 391 §2). As the practical application of the principle in canon 135 is most easily seen in the governance of the diocesan bishop, certain examples used in this article are taken from his exercise of legislative, executive, and judicial power.

1.1 — Sources in *CIC 1917*

Canon 135 §1 is listed with ten sources, taken from *CIC 1917* (4), pre- and post-conciliar documents (4), *Lumen gentium* (1) and the principles on the revision of the Code (1).[6] The remaining three paragraphs of the canon are not listed with sources. However, the origin and presence in the Church

[3] Cf. *ibid*., p. 224.

[4] Cf. *ibid*., p. 241.

[5] Canons from the Code of 1917 are given as *CIC*/17, canon(s) or *CIC*/17, c(c).

[6] The sources of c. 135 §1: *CIC*/17, cc. 201 §§2-3; 335 §1; 2220 §1; 2221; PIUS XI, encyclical letter *Quas primas*, 11 December 1925, in *AAS* 17 (1925), p. 599; SACRED CONGREGATION FOR THE DISCIPLINE OF THE SACRAMENTS, circular letter, 15 June 1952; PIUS XII, MP

of this principle of the threefold expression is older than the Code of 1917. The concrete roots of a functional distinction are found in medieval canon law, where it "was introduced as a practical way of maintaining the unity of power."[7] The emergence of various vicars of the diocesan bishop (archdeacon, vicar general, *officialis*) required a distinction between the three expressions to protect the unity of the governing power of the bishop from a division of powers that seems to identify several—by implication, equal—pastors of the diocese. The initial schema of the *Dogmatic Constitution on the Church* of Vatican I included a mention of three expressions of the power of governance, however, it was in large part an apologetic reaction to those who negated the Church's right to punish offenders and condemn actions.[8] Following the Council, in two of his encyclicals, Pope Leo XIII affirmed that these concrete expressions of the power of governance properly belong to the Church.[9]

The four canons of *CIC 1917* that are the sources of canon 135 give a sense of the various functions of the power of governance. However, they lack the completeness that would be provided in the new Code. *CIC*/17, canon 201—forming part of the title on ordinary and delegated power—speaks of judicial power in §2 and of "voluntary power of jurisdiction […] non-judicial [power]"[10] in §3. There is no mention of legislative power, something which would lead commentators to argue for a twofold expression of the power of governance. F. Maroto, repeating canon 201, held that the power of jurisdiction was expressed as voluntary or non-judicial power (including all non-judicial forms of power) and judicial (divided into contentious and penal) power.[11] In a more nuanced view, A. Ottaviani further

Cleri sanctitati, 2 June 1957, c. 399 §1, in *AAS* 49 (1957), p. 550; *LG* 27; *REU* 106-107; Principle 7 on the Revision of the Code of Canon Law.

7 W. AYMANS, "Die Leitung der Teilkirche," in M. THÉRIAULT and J. THORN (eds.), *The New Code of Canon Law*, vol. 2, Ottawa, 1986, p. 599. All translations are mine unless an English source is given.

8 Cf. E. LABANDEIRA, *Trattato di diritto amministrativo canonico*, Milano, 1994, p. 131 (=LABANDEIRA, *Trattato di diritto*).

9 In *Immortale Dei*, Leo XIII states that "Itaque dux hominibus esse ad caelestia, non civitas sed Ecclesia debet: eidemque hoc est munus assignatum a Deo, ut de iis quae religionem attingunt, videat ipsa et statuat: ut doceat omnes gentes: ut christiani nominis fines, quoad potest, late proferat; brevi, ut rem christianam libere expediteque iudicio suo administret," LEO XIII, encyclical letter *Immortale Dei*: in *ASS* 18 (1885), p. 165; cf. IDEM, *Satis cognitum*, in *ASS*, 28 (1895/6), p. 708; cf. LABANDEIRA, *Trattato di diritto*, p. 131.

10 All quotes from *CIC 1917* are taken from E. N. PETERS (ed.), *The 1917 Pio-Benedictine Code of Canon Law. In English Translation with Extensive Scholarly Apparatus*, San Fransisco, 2001.

11 Cf. P. MAROTO, *Intitutiones iuris canonici*, Romæ, 1921, vol. 1, p. 862.

divides non-judicial power into governance, administration and coercion.[12] On the other hand, W. H. Onclin presents as "functions of power of governance": voluntary power (with the consent of the subjects) and contentious (against the will of the subjects), with legislative power being a possible third function or classification of power of governance.[13] Even though the 1917 Code recognised the difference between legislative and administrative acts, it focussed on their origins in the same authority rather than their differences as expressions of the power of jurisdiction.[14]

Despite the exclusion of legislative power from a general presentation of the power of jurisdiction, it is included in *CIC*/17, canons 2220 §1 and 2221 that form part of the penal law of *CIC 1917*. The first canon speaks of those who have "power of imposing laws or precepts," being able to attach penalties to such a law or precept, whereas those with judicial power are only able to "apply penalties legitimately established according to the norm of law." The second canon, again within the framework of imposing penalties, mentions those "having legislative power" and their possibilities in enhancing laws. P. Ragazzini, another commentator on the old Code, divided legislative power into constitutive (concerns the structure of the Church) or ordinary (for the members of the Church in view of their supernatural end).[15]

CIC/17, canon 335 §1 on the power of the diocesan bishops is, as mentioned above, the clearest of all these canons as to the existence of various functions of the *potestas regiminis*: "To [the residential bishops] belongs the right and duty of governing the dioceses both in spiritualities and temporalities with legislative, judicial, and coercive power to be exercised according to the norms of sacred canons." The old Code used the term *coercive*, as *executive* was only later employed to describe this expression of power. However, as A. Ottaviani's division makes clear, this term in a very general way encompasses the same expressions of power as *executive* would in the new Code. This ensured—in relation to the diocesan bishop—the basic threefold expression of the power of governance, and these three expressions seem to include "all that this power carries out in its exercise"[16]—the complete and total governing power in the Church.

[12] Cf. A. OTTAVIANI, *Institutiones iuris publici ecclesiastici*, Romæ, 1958, vol. I, p. 73.

[13] Cf. W. H. ONCLIN, "The Church Society and the Organization of Its Powers," in *J*, 27 (1967), pp. 9-10 (=ONCLIN, "The Church Society").

[14] Cf. F. J. URRUTIA, "Il Libro I: Le norme generali," in J. BEYER et al (eds.), *Il nuovo Codice di diritto canonico. Studi*, Torino, 1985, p. 33 (=URRUTIA, *Il Libro I*).

[15] Cf. S. M. RAGAZZINI, *La potestà nella Chiesa. Quadro storico-giuridico del diritto costituzionale canonico*, Roma, 1963, pp. 190-191.

[16] P. G. MARCUZZI, "Distinzione della potestas regiminis in legislativa, esecutiva e giudizionaria," in *Salesianum*, 43 (1981), p. 278 (=MARCUZZI, "Distinzione della potestas regiminis").

1.2 — From the 1917 Code to the Revision

After the promulgation of the Code in 1917, the three expressions of governing power would gradually become more visible and articulated in magisterial and canonical documents. In his 1925 encyclical *Quas primas* regarding the power of the kingship of Christ,[17] Pope Pius XI referred to the threefold expression of the power of governance. Based on the witness of the Gospels, the Pope argued that, not only did the Father hand over jurisdiction to the Son, but this jurisdiction was threefold: legislative, executive, and judicial.[18] It is noteworthy that he used the term *executive* to denote the non-legislative and non-judicial power. His successor, Pius XII, in the motu proprio *Cleri sanctitati* (1957)—by which the canonical provisions on clerics for the Eastern Catholic Churches were promulgated—stipulated that those who govern an Eparchy do so "with legislative, judicial, executive power exercised according to the norm of the canons."[19]

The Second Vatican Council, as its focus was not canonical, did not speak directly of the threefold division of the power of governance. However, the distinction of power of governance as three expressions was part of the first schema of chapter X of the Dogmatic Constitution on the Church (entitled *De Ecclesiæ potestate*). It declared that the power of governance in the Church is "absolute and in all things complete, [being] of course legislative, judicial and coercive."[20] In its final version, *Lumen gentium* 27 gave a general description of power of the diocesan bishop:

> This power which they exercise personally in the name of Christ is proper, ordinary and immediate, although its exercise is ultimately controlled by the supreme authority of the church and can be circumscribed within certain limits for the good of the church or of the faithful. By virtue of this power, bishops have the sacred right and duty before the lord of making laws for their subjects, of passing judgement on them and of directing everything that concerns the ordering of worship and the apostolate.

The text would also furnish canons 381 and 391 with their outline of the characteristics and threefold expression of the governing power of the diocesan bishops. The source from articles 106-107 of *Regimini Ecclesiæ*

[17] Cf. E. LABANDEIRA, "La distinción de poderas y la potestad ejecutiva," in *IC*, 28 (1988), p. 91 (=LABANDEIRA, "La distinción").

[18] Cf. PIUS XI, encyclical letter *Quas primas*, in *AAS*, 17 (1925), p. 599.

[19] "... cum potestate legislativa, iudiciaria, exsecutiva ad normam canonicum exercenda," PIUS XII, MP *Cleri sanctitati*, c. 399 §1, in *AAS*, 49 (1957), p. 550.

[20] "... absolutam atque omnino plenam, niminum legislativam, iudiciariam et coercitivam," quoted in W. ONCLIN, "De potestate regiminis in Ecclesia," in P. LEICHING , F. POTOTSCHING, and R. POTZ (eds.), *Ex æquo et bono*, F. W. M. Plöchl, Innsbruck, 1977, p. 226.

universæ—the Apostolic Constitution of Paul VI reforming the Roman Curia (cf. *CD* 9)—concern the additional responsibilities given to the Apostolic Signatura over issues of administrative (=executive) power.

2 — *Principle 7 on the Revision*

The inclusion of a clear canon on the threefold expression of power of governance in the Code of Canon Law has its direct origin in principle 7 on the revision of the Pio-Benedictine Code. At the end of the Synod of Bishops in 1967, principle 7 was approved with 148 *placet* and 39 *placet iuxta modum* votes,[21] reflecting the majority support that all the proposed principles received during the Synod of 1967.[22] The relevant part of this principle, found in its final section, reads: "Having accepted this principle, that the rights of the faithful must be safeguarded, then *the various functions of ecclesiastical power can be clearly distinguished—namely the legislative, the administrative, and the judicial*. Then, too, we can also properly determine what special functions are to be exercised by each arm of the law."[23] The principle gives two central points: the reason for a clear distinction of

[21] Cf. G. CAPRILE, *Il Sinodo dei Vescovi. Prima assemblea generale*, Roma, 1968, p. 136.

[22] Cf. J. L. GUTIÉRREZ, "La formazione dei principi per la riforma del 'Codex Iuris Canonici'," in J. CANOSA (ed.), *I principi per la revisione del Codice di Diritto Canonico. La ricezione giuridica del Concilio Vaticano II*, Milano, 2000, p. 20.

[23] PONTIFICAL COMMISSION FOR THE REVISION OF THE CODE OF CANON LAW, "Guiding Principles for the Revision of the Code of Canon Law" (=PCCIC, "Guiding Principles"), English translation as part of T. J. Green, "The Latin and Eastern Codes: Guiding Principles," in *J*, 62 (2002), p. 274 (=GREEN, "The Latin and Eastern Codes"). The Latin original reads: "Admisso hoc principio, potestatis ecclesiasticæ clare distinguatur diversæ functiones, videlicet legislativa, administrativa et iudicialis, atque apte definiatur a quisbusdam organis singulæ functiones exerceantur," in *Comm*, 1 (1969), p. 83. However, a second English translation of the text gives it in a slightly different light, while not diverging from the original any more than the translation above: "To achieve this it is necessary that the various functions of ecclesiastical power be clearly distinguished, i.e. the legislative, administrative and judicial functions. What individual functions are to be exercised by which governmental organs are also to be defined." See CANON LAW SOCIETY OF AMERICA, *Code of Canon Law. Latin-English Edition*, Washington D.C., 1993, pp. xxi-xxii. The English translation of R. Cunningham gives the text as: "Admitting this principle [the need for recourse for the defense of subjective rights], the diverse functions of ecclesiastical power, viz., legislative, administrative, and judicial, should be clearly distinguished. The one who is to exercise these functions and to what extent should be clearly defined." See R. CUNNINGHAM, "The Principles Guiding the Revision of the Code of Canon Law," in *J*, 30 (1970), p. 453 (=CUNNINGHAM, "The Principles").

the three is the protection of rights, and it facilitates the clear identification as to who is able to exercise the various expressions.

One cannot avoid noticing, however, that this part of principle 7 has largely been ignored in canonical literature. Although often mentioned by commentaries when dealing with canon 135 (and c. 391), principle 7 is mainly identified as the principle that advocated the introduction into canon law of administrative tribunals and the defence of subjective rights.[24] This seems a rather peculiar turn of events in the context of the history of *CIC 1983*, as these administrative tribunals—although supported by the final plenary session of the Commission on the Revision of the Code—were not included in the promulgated Code, and therefore not introduced in the Church (with the notable exception of the Second Section of the Apostolic Signatura).[25]

2.1 — Defence of Rights

Principle 7 seeks "to facilitate the protection of subjective rights by precluding arbitrariness and fostering an objective exercise of ecclesial power."[26] In its defence of legal rights, the principle seeks to remove any suspicion of malpractice in Church administration or the possibility of Church administration being harmful to the faithful. Also, all forms of arbitrariness must be excluded as they jeopardise "the integrity of the judicial order."[27] In line with this, J. C. Herranz considers the division of the three expressions of the power of governance to be an indispensable prerequisite for the principle of legality in canon law; and A. Ranaudo—based on the

[24] For example, in his presentation of the ten principles, J. A. Alesandro does not even mention the threefold expression of the power of governance in principle 7, focussing exclusively on the protection of subjective rights through administrative recourse/tribunals. See J. A. ALESANDRO, "The Revision of the Code of Canon Law: A Background Study," in *StC*, 24 (1990), p. 109 (=ALESANDRO, "The Revision"). Also J. Llobell deals with principle 7 without mentioning the three expressions of the power of governance. See J. LLOBELL, "Il sistema giudiziario canonico di tutela dei diritti. Riflessioni sull'attuazione dei princìpi 6° e 7° approvati dal Sinodo del 1967," in J. CANOSA (ed.), *I principi per la revisione del Codice di Diritto Canonico. La ricezione giuridica del Concilio Vaticano II*, Milano, 2000, pp. 501-546. T. J. Green mentions the threefold division, but solely in relation to the protection of rights and its effects in reducing conflicts in the Church. See GREEN, "The Latin and Eastern Codes," p. 248.

[25] Cf. ALESANDRO, "The Revision," p. 110.

[26] T. J. GREEN, "The Pastoral Governance Role of the Diocesan Bishop: Foundations, Scope and Limitations," in *J*, 49 (1989), p. 484 (=GREEN, "The Pastoral Governance").

[27] W. L. DANIEL, "The Principle of Legality in Canon Law," *J*, 70 (2010), p. 46 (=DANIEL, "The Principle").

idea that power is for service and the need for the protection of subjective rights—held that there is a distinct need for a delineation and distinction of the three expressions of the power of governance.[28]

Although related to executive power of governance in particular, the point made by J. Niedergasse is valid for all three expressions and echoes the call of principle 7: "When the limits of competence are not known either to those charged with the responsibility of administration or to those who are to be affected by the acts of administration, occasion for misunderstanding, mistrust and conflict is great."[29] This is emphasised by the fact that another time-honoured protection of individual rights, the right and the actual form of appeal, is dependent on identifying the exact expression of the power of governance, as recourse against a law considered unjust is different from appeal against a judicial sentence. Concretely, the protection of subjective rights in the Church found its way into the Code in three places: canon 221 §1 (on the right of all Christ's faithful to "lawfully vindicate and defend the rights they enjoy in the Church, before the competent ecclesiastical forum in accordance with the law"), canon 1491 (on the procedural defence of rights), and canons 1732-1739 (on hierarchical recourse).

2.2 — Distinctions and Holders of Power

Principle 7 asked that the distinction of the three expressions of the power of governance be clarified on two levels. First, the various expressions must be distinguished one from the other.[30] To accomplish this it advocates a clearer specification of the nature of the act of governance: each act should be clearly specified as being legislative, executive or judicial. Secondly, it must be clear who the titulars of the three expressions are: who may exercise legislative, executive, and judicial power. C. Bernardini explains these two elements causing a "distinction *in the formal sense* and

[28] Cf. A. RANAUDO, "Le funzioni amministrative e giudiziarie della Chiesa dopo il Concilio Vaticano II," in *ME*, 94 (1969), pp. 311-312.

[29] J. NIEDERGASSE, "Governing a Local Church," in *Or*, 9 (1980), p. 640 (=NIEDERGASSE, "Governing a Local Church").

[30] A. McCormack argues that the introduction to the canonical system of the threefold expression of the power of governance in cc. 135 and 391 brought with it the recognition that not only legislative and judicial acts had juridical effects but also individual acts of executive power. Cf. A. MCCORMACK, *The Term "Privilege": A Textual Study on Its Meaning and Use in the 1983 Code of Canon Law*, Tesi Gregoriana, Serie Diritto Canonico 23, Roma, 1997, p. 377.

in the material sense, that is, a distinction of the organs and a distinction in functions"[31] (emphasis in the original).

The *material distinction* seeks to identify each act of governance as being legislative, executive, or judicial. When a diocesan bishop promulgates a particular law, that act of governance is a *legislative* act (an act of legislative power); when he appoints a parish priest, that act is an *executive* act (an act of executive power); when he gives judgement in a marriage nullity case he has reserved to himself, that act is a *judicial* act (an act of judicial power). Although these three are very clear examples of employing a material distinction of the three expressions, E. Labandeira argues that, to identify each act of governance as being legislative, executive or judicial, one often needs to carefully consider the content of each document—the concrete act of governance.[32] This is obvious as the external elements of an instruction (executive power) and a law (legislative power) may be very similar in a particular Church: same type of paper with the diocesan coat-of-arms, etc., same series of protocol number, same enumeration of sections, and the same conclusion with the signature of the bishop and chancellor, as well as the date and seal of the diocese. One should be able to clearly identify every act of governance as being legislative, executive or judicial. If an act falls outside these three, it is not an act of the power of governance.

The *formal distinction* seeks to identify which titulars may carry out which of the three expressions:[33] the vicar general and the judicial vicar both exercise power of governance, but they exercise two different expressions of it, executive and judicial power respectively. It is further important not only to identify what titular is able to exercise what particular expression of the power of governance but also to establish the limits of the titular's power, for example, through the decree of appointment of an episcopal vicar, which gives the difference between his power and the broader executive power of the vicar general (cf. c. 476).

Without both the material and the formal distinction, one cannot fully explain the difference between the three expressions and their exercise. This becomes especially clear when considering the distinction between the expressions of the power when these are exercised by one office, as is the case with the diocesan bishop. For example, the diocesan bishop may both

[31] C. BERNARDINI, "De administratione tribunalium i.e. de exercitio potestatis adminisrativæ in ambitu tribunalium," in R. BIDAGOR (ed.), *Questioni attuali di diritto canonico*, Roma, 1955, p. 447 (=BERNARDINI, "De administratione tribunalium").

[32] Cf. LABANDEIRA, *Trattato di diritto*, pp. 249-250.

[33] Cf. J. I. ARRIETA, *Diritto dell'organizzazione ecclesiastica*, Milano, 1997, pp. 59ff. (=ARRIETA, *Diritto dell'organizzazione*).

promulgate a law and give a general executive decree on the same law. Only by identifying that these two acts are acts of the legislative and executive expressions of the power of governance respectively is it possible to fully differentiate these two concrete acts in line with principle 7.

3 — *Legislative Power*

Legislative power is for "the giving of norms, that is the production of abstract, general, lasting and for an unlimited number of cases applicable rules for the promotion of the life of a community."[34] Therefore, legislative power concerns laws in the Church and their effect on and in the community. However, a point made by J. Niedergasse should be highlighted from the outset: "The legislative and judicial functions of church governance are not widely understood […] church governance is largely identified with the making of administrative decisions."[35] It is, therefore, crucial to have a clear idea of what ecclesiastical law is, as only what is *law* in a strict sense falls under—and fully explains—this expression.[36]

3.1 — Ecclesiastical Laws

Legislative power in the Church produces obligatory norms for the community—the "generally binding norms for the common life and action of the members of the Church."[37] In *CIC 1983* there is no precise definition of (ecclesiastical) law; however, canon 29 does come close to offering a definition: "General decrees, *by which common provisions for a community capable of receiving a law are made by a competent legislator*, are true laws and are regulated by the provisions of the canons on laws" (my emphasis). This mirrors the classic definition of a law given by St. Thomas Aquinas: "an ordinance of reason for the common good, promulgated by the one who has care of the community."[38] It is noteworthy that the 1980 Schema of the

[34] T. A. Amann, "Die Ausübung der *sacra potestas* im kirchlichen Richterkollegium," in *DPM*, 10 (2003), p. 100.

[35] Niedergasse, "Governing a Local Church," p. 639.

[36] Cf. G. Brugnotto, "Tipologia degli atti legislativi del vescovo diocesano," in *QDE*, 20 (2007), pp. 126-127 (=Brugnotto, "Tipologia degli atti legislativi").

[37] H. Socha, "Commentary on cc. 129-144," in K. Lüdicke et al. (eds.), *Münsterischer Kommentar zum Codex Iuris Canonici*, Essen, 1984ff., c. 135, n. 3 (=Socha, "Commentary on cc. 129-144").

[38] Thomas Aquinas, *Summa Theologiæ*, I-II, q. 90, art. 4, 1.

Code, as part of the then canon 7, included an attempted definition of laws: "Law, namely a general norm given by the competent authority for the common good of the community, comes into being when it is promulgated.[39] However, this text was removed prior to promulgation.

A law is normative for every member of a community or a clearly specified group. It does not bind only one individual. It seeks to provide for the well-being of the entire community seen as a community with a common mission and goal. Law concerns future situations, even for an infinite number of situations. This is also expressed in the non-retroactivity of law enshrined in canon 9: "Laws concerns matters of the future, not those of the past […]." A law is a primary and original norm in the legal system—it is not secondary, auxiliary or subordinate to other norms[40]—legislative power creates autonomous legal norms that are placed alongside existing laws.[41] The link between law and the mission of the Church was noted by Paul VI who tied post-conciliar law to the teaching of the Council: "We would like to point out that the drafting of new law, which must take its inspiration from the Council, will be nothing but an application of this teaching.[42]

Several canonists have spoken about legislative power as encompassing various stages of activity. A. Mendonça states that legislative power "concerns the development, promulgation and interpretation of law,"[43] giving three distinctive stages: development (drafting), promulgation (law coming into force) and interpretation (the clarification of law already in effect). To this should be added the partial or total alteration or cancellation of law: obrogation, derogation or abrogation, something included by W. H. Onclin, who affirms that legislative power is "the creation, modification, or suppression of a general juridic condition, a common statute."[44]

These four *stages* of legislative power have been developed further by M. Wijlens, who refers to them as: a) drafting of a law, b) its promulgation,

[39] "Lex, norma silicet generalis ad bonum commune alicui communitati a competenti auctoritate data, instituitur cum promulgatur," quoted in J. LISTL, "Die Rechtsnormen," in J. LISTL, H. SCHMITZ and H. MÜLLER (eds.), *Handbuch des katolischen Kirchenrechts*, 2nd ed., Regensbrug, 1999, p. 103, fn. 7.

[40] Cf. F. J. URRUTIA, "Legis ecclesiasticæ definitio," in *P*, 75 (1986), p. 332.

[41] Cf. URRUTIA, "Il Libro I," p. 34.

[42] PAUL VI, Allocution to the Roman Rota, 8 February 1973; English translation, "The Pastoral Nature of Church Law and Canonical Equity," in W. WOESTMAN (ed.), *Papal Allocutions to the Roman Rota 1939-2002*, Ottawa, p. 117 (=PAUL VI, Allocution 1973).

[43] A. MENDONÇA, "Commentary on cc. 1-95," in G. SHEEHY et al. (eds.), *The Canon Law Letter and Spirit. A Practical Guide to the Code of Canon Law*, London, 1995, p. 81 (=MENDONÇA, "General norms").

[44] ONCLIN, "The Church Society," p. 13.

c) its reception and shaping of the intended community, and d) its obrogation, derogation, abrogation or falling into disuse. M. Wiljens primarily identifies legislative activity proper with the first two: the drafting of a law and the promulgation of the law, although she refers to the latter as "a merely technical procedure according to which the laws is published."[45] This would, however, appear to limit the role of promulgation, because promulgation is the act that brings a law into being (cf. c. 7), the juridical act whereby law is given (created) and proclaimed in the Church. The object of promulgation is to establish authentically that the law exists, as well as giving the precise wording of the law, and thus—in accordance with canon 17—giving its reach and limitations. According to canon 8, promulgation is not simply publication. This is also the moment when the time of the *vacatio legis* begin, the time until the new law comes into force. Through promulgation, law is "made known to those whom it is meant to oblige."[46] Although the diocesan bishop is able to determine the *vacatio legis*, it must be underlined that any appearance of arbitrary or unclear promulgation of law must be avoided.

The complete scope of legislative activity encompasses a series of actions that are necessary not only to bring about a new law in the Church but also properly address the laws already in place. There is no doubt that the promulgation of law—the precise giving of the law for the community—is important. But, so is the work that goes prior to promulgation: the development of the law (including consultation and drafting) and the work that succeeds the act of promulgation: the explanation of laws (making law clear for the community it is given for), the urging of their implementation and the correct following of their norms (assuring that law is respected and observed), as well as making changes to laws when needed. This is seen in the fact that the legislator, based on the same legislative competence by which he gave a law, may also interpret, dispense, derogate, obrogate and abrogate from these laws.

The provision of canon 16 on authentic interpretation should also be considered. Such an interpretation is carried out by "the legislator and by that person to whom the legislator entrusts the power of authentic interpretation." An example of the latter in the context of the universal Church is the Pontifical Council for Legislative Texts which, according to *Pastor bonus* 155, is "competent to publish authentic interpretations of universal laws of

[45] M. WILJENS, "'For You I am Bishop, with You I am a Christian': The Bishop as Legislator," in *J*, 56 (1996), p. 79.

[46] MENDONÇA, "General norms," p. 7.

the Church which are confirmed by pontifical authority." The effects of an authentic interpretation, which is "presented by way of a law, has the same force as the law itself" (c. 16 §2). It has retroactive force if it declares the sense of the words while, if it restricts a law or explains a law that is doubtful, it does not have retroactive force.[47]

3.2 — Canon 135 §1 on Legislative Power

The paragraph that concerns legislative power opens with the assertion that this power is "to be exercised in accordance with the norms of law." In this context, this means adherence to those requirements that concern laws in the Church as given in canons 7-22. It goes on to outline the hierarchy of laws and the delegation of this expression of the power of governance.

3.2.1 — *Hierarchy of Laws*

Those with legislative power in the Church, *legislators*, have this power either for the universal Church (Pope and college of bishops), for their particular Church (diocesan bishops), or for their territory (episcopal conferences, particular councils). They stand in a superior-inferior relationship to one another. This hierarchical relationship, founded on the very constitution of the Church, must be respected. Its consequences are most clearly expressed in canon 135 §2: "A lower legislator cannot validly make a law which is contrary to that of a higher legislator." This principle is fortified by the competence granted in *Pastor bonus* 158 to the Pontifical Council for Legislative Texts, namely that of securing that particular legislation does not violate universal legislation.[48] The principle of the hierarchy of laws/superiors/norms: "consists of the basic rule that all normative juridical acts, whether legislative or administrative in nature, cannot contradict norms which are superior to them."[49] P. Amenta stresses this by noting that the legislative power of the diocesan bishop cannot 1) in any way violate divine law or 2) violate ecclesiastical law given by a superior legislator, including

[47] Cf. H. SOCHA, "Commentary on cc. 1-95," in K. LÜDICKE—al. (eds.), *Münsterischer Kommentar zum Codex Iuris Canonici*, Essen 1984ff., c. 16, nn. 8-15 (=SOCHA, "Commentary on cc. 1-95").

[48] However, this competence is limited by the initial phrase in the article: "At the request of those interested, this Council determines whether particular laws and general degrees issued by legislators below the level of the supreme authority are in agreement or not the universal laws of the Church" (*PB* 158).

[49] DANIEL, "The Principle," p. 49.

plenary or regional (provincial) councils or the episcopal conferences when these have been promulgated validly.[50]

3.2.2 — *Delegation of Legislative Power*

The canon severely limits the possibility of delegating legislative power: "Legislative power […] cannot validly be delegated, unless the law explicitly provides otherwise." However, it should be noted immediately that this limitation is based on the positive decision of the Legislator. It is, as the discussion of the Pontifical Commission for the Revision of Canon Law following the presentation of the 1981 *Relatio* affirmed, not an ontological impossibility.[51]

This limitation is based on the hierarchy of legislators, as the canon only restricts the delegation of legislative power by "a legislator lower than the supreme authority," which means any legislator in the Church other than the Pope and the college of bishops.[52] Any such delegation is invalid in accordance with canon 10, as canon 135 expressly states that legislative power "cannot validly be delegated." The canon gives, however, a possibility of such delegation below the supreme authority by stating "unless the law explicitly provides otherwise." At present, no law exists that gives such a possible delegation of legislative power.

3.3 — The Role of Legislative Power

Legislative power is related to the ends of the society it seeks to serve. Through law, the structure of the Church and the norms concerning her mission (including those governing the sacramental life of the Church and the preaching of the Word of God) are established. Owing to this highly formative nature of legislative power, it has been referred to as the "supreme expression of the power of governance."[53]

In addition to its formative effect on the life of the Church (governing the common life and the common mission), law is also "of vital importance to the life of the church because only through law can the dignity of each

[50] Cf. P. AMENTA, *Partecipazione alla potestà legislativa del Vescovo*, Tesi Gregoriana, Serie Diritto Canonico 8, Roma, 1996, pp. 93-94 (=AMENTA, *Partecipazione alla potestà legislativa*).

[51] Cf. *Com*,, 14 (1982), pp. 150-151.

[52] Cf. CARDIA, *Il governo della Chiesa*, p. 42.

[53] W. AYMANS and K. MÖRSDORF, *Kanonisches Recht. Lehrbuch aufgrund des Codex Iuris Canonici*, vol. 1, Paderborn, 1997, p. 422.

person be protected with rights and responsibilities clearly delineated."[54] Law enshrines the values of the community so as to allow these to guide the community itself, which in the Church also involves giving laws that outline, delineate and protect those obligations and rights that belong to all the faithful and the various groups of faithful.[55]

Law seeks to bring about the common good, allowing each member of the community and the community as a whole to reach its goal. As such, legislative power properly belongs to the one who is charged with guiding the community towards its true end (Pope and college of bishops for the universal Church, diocesan bishop for the particular Church). According to P. Kroczek, the fundamental purpose of legislation in the Church is simply to assist the faithful on their way towards salvation through the giving of laws that aid this universal Christian obligation.[56] Legislative power is essentially *pastoral*. This is clearly seen when it protects the rights of the faithful, builds on the core values of the Church and structures the particular Church in relation to its specific situation and needs. Through these fundamental elements it aids the Church in carrying out her pastoral mission, the *salus animarum*.

The unique role of legislative power has been summed up by J. Gracía Martín: "It is the most eminent function of the power of governance, because on this the two others depend."[57] This is because both the other functions cannot operate without law, as they are by their very nature aimed at carrying out the law. T. J. Green is somewhat more cautious in formulating this point but acknowledges the same: "Perhaps the most significant governmental function is the issuing of norms binding the faithful of a particular jurisdiction."[58]

4 — *Executive ower*

An important point was asserted by P. G. Marcuzzi: "There is no particular difficulty with the terms used to indicate the legislative and judicial

[54] NIEDERGASSE, "Governing a Local Church," p. 639.

[55] Cf. *ibid*.

[56] Cf. P. KROCZEK, "Authority of Bishop as Lawgiver," in *Ang*, 87 (2010), p. 912 (=KROCZEK, "Authority of Bishop as Lawgiver").

[57] J. GARCÍA MARTÍN, *Le norme generali del Codex Iuris Canonici*, 2nd ed., Roma, 1996, p. 491.

[58] GREEN, "The Pastoral Governance," p. 484.

function: *legislativa et iudicialis*"[59] (emphasis in the original). In other words, the terms *legislative* and *judicial* as they apply to these two expressions of the power of governance in the Church are not subject to debate or a lack of clarity, while the term used to describe the third and final expression of the power of governance, *executive*, is more complicated.

4.1 — *Executive* or *Administrative*

In *CIC 1917* the term *administrative* was not used, although *administration* is used frequently. Commentators on the old Code spoke about administrative power, but no consensus existed as to the precise meaning of the term.[60] *CIC*/17 canon 335 §1 used the term *coercive* for what would later be described as *executive*. However, these two cannot be said to be fully identical. Coercive is above all aimed at "the correction and the punishment of the offender,"[61] while *executive* has a much greater mandate, despite it being identified principally as being directed to coercion and punishment in post-*CIC 1917* commentaries. Two papal documents following the publication of the Code, *Quas primas*[62] of Pius XI and *Cleri sanctitati*[63] of Pius XII, used *executive*. However, in *Quas primas*, the term *executive* was identified with *coercive*—the imposition of penalties.[64] This lack of scientific rigour as to the specific delineation between the various expressions led to various theories being adopted by canonists to the point that some simply added *administrative* or *executive* as a fourth expression, alongside *legislative*, *judicial* and *coercive*.[65]

Vatican II, on the other hand, described it as being the power "of directing everything that concerns the ordering of worship and the apostolate," that is, "the power to consider and direct all that pertains to the Christian life,"[66] opting for the term *ordering* (*moderandi*). This word, which in the conciliar documents is used several times "in the very sense of governance, direction," refers "to the pastoral function of the bishop in his diocese."[67]

[59] MARCUZZI, "Distinzione della potestas regiminis," p. 294.

[60] F. J. URRUTIA, "Administrative Power in the Church according to the Code of Canon Law," *StC*, 20 (1986), pp. 253-254 (=URRUTIA, "Administrative Power").

[61] LABANDEIRA, *Trattato di diritto*, p. 131.

[62] *AAS*, 17 (1925), p. 599.

[63] *AAS*, 49 (1957), p. 550 (c. 399 §1).

[64] Cf. *AAS*, 17 (1925), p. 599; E. LABANDEIRA, *Trattato di diritto*, p. 133.

[65] Cf. LABANDEIRA, *Trattato di diritto*, p. 132.

[66] I. GORDON, "La responsabilità dell'amministrazione pubblica ecclesiastica," in *ME*, 98 (1973), p. 389.

[67] MARCUZZI, "Distinzione della potestas regiminis," p. 288.

Principle 7 for the revision of the Code used the term *administrative* instead of *executive*,[68] while *CIC 1983* makes use of both terms to describe the same expression of power of governance. However, "the adjective *exsecutiva* is normally identified with the adjective *administrativa* properly in reference to *potestas*"[69] (emphasis in the original). These terms lead G. Marcuzzi to conclude his article by stating that there is no unequivocal terminology on the single functions of the power of governance.[70] J. Canosa reaches the same conclusion, while also noting that "while legislative and judicial power do not offer particular complications at the moment of their individual execution, in the case of executive power, the canonical juridical order presents the same difficulty of defining that is present in other systems of public law."[71]

E. Labandeira argues that canons 135 and 391 settle this question once and for all, as they clearly establish that power of governance is expressed in legislative, judicial and *executive* power.[72] However, contrary to the argument that these two are the same, it must be underlined that the Code does use the term *administrative* power. It is employed in two canons of the Code, as well as in the section on singular administrative acts (cc. 35-93). The two canons (cc. 1400 §2 and 1445 §2) refer to what the Code considers to be contentious-administrative—reflecting the use of *administrativ*e as *public administration* in *Regimini Ecclesiæ universæ* 106 (on the competences of the Second Section of the Apostolic Signatura)—leading M. R. Moodie to state that in "their use of terms, canons 1400, §2 and 1445, §2 stands alone."[73] He goes on to note that, despite the terminological confusion, it is clear from the Code that, with regard to these two canons, the *administrator* is one who carries out acts of executive power, and administrative acts or activity refers to executive power of governance. Throughout the Code the term *administration* (or *administrator*) is used for a much wider field than is described by executive power. *Administration* is for example used to describe the complete running of a diocesan seminary (c. 259 §1), which would certainly include acts far beyond executive power of governance.

[68] Cf. PCCIC, "Guiding Principles," p. 274; LABANDEIRA, "La distinción de poderes," p. 91.

[69] MARCUZZI, "Distinzione della potestas regiminis," p. 294.

[70] Cf. MARCUZZI, "Distinzione della potestas regiminis," p. 302.

[71] J. CANOSA, "I principi e le fasi del procedimento amministrativo nel diritto canonico," in *IE*, 18 (2006), p. 551.

[72] Cf. LABANDEIRA, *Trattato di diritto*, p. 134.

[73] M. R. MOODIE, "The Administrator and the Law: Authority and its Exercise in the Code," in *J*, 46 (1986), p. 45 (MOODIE, "The Administrator").

F. J. Urrutia, in his 1986 article on the difference between *executive* and *administrative* in *CIC 1983*, makes some very important points in clarifying the difference between administrative power in a broad sense and executive power of governance in a strict sense. He notes that "all the canons concerned with the power needed to produce those singular administrative acts refer to it as executive power."[74] Based on this and the division of power of governance in canon 135 §1 into legislative, executive, and judicial, the logical conclusion would be that executive power and administrative power are the same. This would also seem to be the conclusion drawn by the group of experts set to deal with these issues during the course of the revision of the Code.[75]

However, the various forms of administrators (diocesan, apostolic, parochial) in the Code also concern something more extensive than executive power of governance. Also, administration is often equated with financial administration, surely a part of Church government, but not necessarily power of governance. More often, administrative powers "pertain to the *general governance* of a given Christian community [and does] not always require an exercise of the power of governance, be it legislative, judicial or executive.[76]" Therefore, administrative power seems to be different from executive power of governance. F. J. Urrutia explains why the Pontifical Commission for the Revision of the Code chose the term *executive* over *administrative* to denote the second function of the power of governance in can. 135 §1:

> *Administrative power* in its broader sense includes every function of the power of governance, including the legislative and the judicial, since each of these functions plays a role in the *ruling* of the Church, whether universal or particular. Moreover, it also includes the teaching and sanctifying powers by which the bishop "rules" or "administers" his Church. In fact, "administration" of a diocese, a term that renders in a rather juridic form the *pastorale munus* of the diocesan bishop (c. 381) […]"[77] (emphasis in the original).

M. R. Moodie argues in another direction when he states that administrative power is an under-expression of executive power of governance. "Within the tripartite division of governance, administrative activity is a function of executive authority."[78]

[74] URRUTIA, "Administrative Power," p. 257.
[75] Cf. *ibid*., pp. 257-258; *Comm*, 9 (1977), p. 233.
[76] URRUTIA, "Administrative Power," p. 261.
[77] *Ibid*., p. 262.
[78] MOODIE, "The Administrator," p. 46.

The Pontifical Council for Legislative Texts took yet another approach in its *Notæ explicativæ* of 12 February 2004. The Pontifical Council stated:

> The term "administration" has a double semantic value that should not be allowed to generate confusion. To administer, in fact, may signify the proper function of ecclesiastical authority—different from that of legislating and of judging—consisting of placing *acts of governance* in respect of law. Apart from this significance, *belonging to the remit of the power of jurisdiction*, there is another *of an economic nature*, which seeks to preserve, to make us of and to improve a patrimony[79] (emphasis in the original).

This text, part of the article under the heading of *Nozione di amministrazione*, is interesting for several reasons. First, it equates the term *administration* (in its adjectival form: *administrative*) with that of executive in regard to the non-legislative, non-judicial expression of the power of governance. Secondly, it uses the term *jurisdiction* and not *governance* to describe the public governing power of the Church (although in keeping with c. 129, it does return to the preferred language of the old Code). Finally, it goes on, after the text quoted above, to point out that the legislator made use of both meanings of the term—jurisdictional and economic—in the Code. In Book I of the Code there are *administrative* acts, while canon 1279 obliges each public juridical person to have a financial *administrator*.

As regards the executive function of the power of governance, most of the post-conciliar canonical scholarship has been taken up with administrative justice—contentious administrative procedure, or hierarchical recourse—not with the nature and general purpose of the expression itself.[80] Also, partly due to this double terminology, many authors have used these two terms as synonyms. F. J. Urrutia argues that a clarification on executive power—a more accurate understanding of what it involves—is of immense importance to the Church because this power is used most frequently.[81]

4.2 — Definitions of Executive Power

T. J. Green holds that executive power is entrusted with "implementing diocesan or higher level legislation in differing circumstances and performing various acts necessary or useful for everyday diocesan governance."[82] Because of

[79] PONTIFICAL COUNCIL FOR LEGISLATIVE TEXTS, explanatory note *La funzione dell'autorità ecclesiastica sui beni ecclesiastici*, 12 February 2004, in *Comm*, 36 (2004), pp. 25-32, art. 4.

[80] Cf. U. NAVARETTE, "Unità della 'Potestas Sacra' e moltiplicità die 'Munera Christi et Ecclesiæ'," in C. MIRABELLI et al. (eds.), *In memoriam W. Schulz*, Frankfurt am Main 1999, volume 2, p. 569 (=NAVARETTE, "Unità della Potestas Sacra").

[81] Cf. URRUTIA, "Il Libro I," p. 34-35.

[82] GREEN, "The Pastoral Governance," p. 487.

this innate connection with the needs of the community, definitions of executive power often make use of the common good or similar terms.[83] Also, because of its very extensive field of operation, it may be said to include all individual measures and concrete acts useful for the end of the society.[84] The majority of definitions on executive power, as that of T. J. Green, are based almost exclusively on the governance of the particular Church, relating its content or activity to ruling a diocese. For example, holding that executive power consist of three fields of operation: juridical execution, administrative activity and activity of governance, and the production of solutions for individual cases and situations.[85]

Despite T. J. Green's clear presentation, focussing on executive power within the context of the particular Church,[86] other definitions of executive power (or approximate to definitions) contain important variations. Therefore, it is tempting simply to identify executive power of governance in a negative way: it is the expression of power of governance that is neither legislative nor judicial.[87] E. Labandeira speaks of this expression as being "that part of the power of governance which includes that which does not belong to judicial power or legislative power, and which, subordinate to the latter, pursues the ends of the Church with its own proceedings."[88]

G. Sarzi Sartori defines the purpose of executive power as "to give the dispositions for the interpretation and the application of laws and the execution of sentences […] and to administer the temporal goods of the Church."[89] M. R. Moodie includes a definition of administrative activity taken from

[83] Cf. LABANDEIRA, *Trattato di diritto*, p. 14.

[84] Cf. ONCLIN, "The Church Society," p. 14.

[85] Cf. ARRIETA, *Diritto dell'organizzazione*, pp. 64ff.

[86] J. M. Huels links his definition not as much to the particular Churc, but to the normality of administration in the Church being expressed as executive power, which is "the power routinely exercised in church administration." J. M. HUELS, "Determining the Correct Canonical Rules for Ambiguous Administrative Acts," *StC*, 37 (2003), p. 12 (=HUELS, "Determining").

[87] H. Kalb argues that O. Mayer, founder of the study of German administrative law, held that executive (public administrative) power as being that which is neither legislative or judicial. Cf. H. KALB, "Verwaltungsakt und Verwaltungsverfahren," in J. LISTL, H. SCHMITZ and H. MÜLLER (eds.), *Handbuch des katolischen Kirchenrechts*, 2nd ed., Regensbrug, 1999, p. 119. Similarly, E. Labandeira makes reference to those canonists who negate any difference between the judicial and administrative/ executive function, following the so-called Vienese school of law. LABANDEIRA, *Trattato di diritto*, p. 12.

[88] LABANDEIRA, *Trattato di diritto*, p. 137. It must be noted that E. Labandeira, in the state, speaks of the administrative function, and does not equate this with the executive function. He speaks instead of executive organisations (the organs that hold/carry out the various powers) and administrative activity (the expressions of the function). *Ibid*., pp. 16, 20-21.

[89] G. SARZI SARTORI, "I vicari del vescovo e l'esercizio della "vicarietà" nella Chiesa particolare," in *QDE*, 18 (2005), p. 10 (=SARZI SARTORI, "I vicari del vescovo").

I. Gordon: "that part of the power of jurisdiction which, within the limits of the law, promotes the common good, both by executing the laws and, to a certain degree if necessary, by interpreting, supplying and complementing the laws by decrees and dispositions; by settling controversies according to its particular mode; and by imposing certain punishments."[90]

Moving in another direction are those authors who, rather than presenting a definition of executive power or a general description of what it entails, offer lists of the major sectors that fall within executive power. M. R. Moodie offers such a tentative and very general list of what the administrative/executive function entails, consisting of four points: nominating persons to office, issuing explanatory directives, settling disputes, and taking care that individuals observe the law.[91] C. Cardia, on the other hand, presents nine categories included in the exercise of executive power. As with M. R. Moodie's list, it is based solely on the diocesan bishop's executive power: the territorial organisation of the diocese, the administration of the sacraments, and the power of orders of the clergy in the diocese, incardination/excardination, the establishment of a seminary and its governance, the erection of associations, vigilance over Catholic education in the diocese, the administration of temporal goods, the conferral of ecclesiastical offices, and the erection of diocesan right institutes of consecrated life and vigilance over religious in general in the diocese.[92] It must be noted that, despite providing various examples of the vastness of executive power, these lists often prove unhelpful as they fail to take into account every concrete aspect of the executive power of governance—such a complete list may indeed be impossible to complete. It is, in other words, difficult to provide a clear-cut definition of this expression of the power of governance. However,—in line with principle 7 on the revision of the Code—approaching each act of governance, does allow for clear distinctions between acts of governance based in this and in the other two expressions.

4.3 — Administrative Acts

J. M. Huels defines a juridic act as "an external manifestation of the will of a capable person which, observing the requirements and formalities of law, produces a juridic effect."[93] In Book I of the Code a section is devoted

[90] English translation MOODIE, "The Administrator and the Law," p. 46; original in I. GORDON, "De tribunalibus administrativis propositis a commissione Codice I. C. recognoscendo et suffragatis ab Episcoporum Synodo," in *Per*, 57 (1968), p. 610.

[91] Cf. MOODIE, "The Administrator," p. 46.

[92] Cf. CARDIA, *Il governo della Chiesa*, p. 173.

[93] HUELS, "Determining," p. 8.

to a series of acts based in executive power. In other words, acts whereby this expression of the power of governance is employed in the life of the Church, the only expression of the *potestas regiminis* that is allotted such a section. In very general terms, these acts may be divided into three: general executory decrees (cc. 31-33), instructions (c. 34) and singular administrative acts (cc. 35-93). Therefore, acts of executive power are either general acts (general executory decrees, instructions, statutes, ordinances) or singular administrative acts. This division is a clear change from the former law, where a decree was simply the form of a document. It lacked a specific nature and was not a juridical act. To clarify these acts, the revision process considered creating a separate *Lex de procedura administrativa*, but this plan was later abandoned.[94]

Canon 34 §1 defines instructions as those acts that "set out the provisions of a law and develop the manner in which it is to be put into effect," given "for the benefit of those whose duty it is to execute the law, and they bind them in the executing law." They apply to those charged with implementing the law, whereas general executory decrees concern the application of law and are for the entire community. Recalling principle 7 on the revision of the Code, and its request for a clear distinction between the three expressions, J. M. Huels notes that "Canons 29-34 represent the most visible result of this principle in the 1983 Code; these canons give clear rules about the authorities competent to enact laws and the subordination of administrative norms to law."[95] He goes on to interpret the structure of canons 29-34 to signify a specific decision on the part of the Legislator to order in a hierarchical fashion, these three: 1) general decrees (laws); 2) general executory decrees (of executive power); and 3) instructions.[96] This would also support the argument that legislative power is superior to executive (and judicial) power.

The singular administrative act (cc. 31-93) is the most important tool for administration, i.e., the exercise of executive power of governance.[97] Singular administrative acts are singular decrees (c. 48), singular precepts (c. 49), rescripts (c. 59 §1), permissions and the oral grant of favours (c. 59 §2). Privileges (c. 76) and dispensations (c. 85) are granted by rescript (c. 75). A rescript is a response to a petition (c. 59 §1). However, such an act may also be given *motu proprio*—"on the initiative of the competent ecclesias-

[94] Cf. *ibid*., p. 14.
[95] HUELS, "A Theory," p. 342.
[96] Cf. *ibid*., pp. 343-344.
[97] Cf. SOCHA, "Commentary on cc. 129-144," c. 135, n. 15.

tical authority."[98] Despite this, a rescript does not change the free nature of executive power, as the holder of this power is not in any way bound to give what is asked in such a petition.

Two particular administrative acts that should be considered here are privileges and general executory decrees, as they are acts of one expression of power but carried out by the titular of another expression of power. J. M. Huels, basing himself on the canonical doctrine of the 1917 and 1983 Codes, defines a privilege as "the right lawfully to do or omit something that is contrary to or apart from the law."[99] A privilege constitutes a private law given for one person, or the presumed perpetual abrogation of a singular law for a singular person.

The grant of a privilege is an act of executive power, yet the one who may grant it is a competent legislator or his delegate: although the granting of privileges belongs to the legislator, the grant of a privilege remains a singular administrative act, not a law.[100] Had a privilege been an act of legislative power, it would not be possible to delegate this except in the case of the supreme legislator (cf. cc. 76 §1, 135 §2), a point that is mute due to it being an act of executive power. However, in the old Code the situation was reversed: "Authors on the 1917 Code, for the most part, considered a privilege to be an act of legislative power."[101] Interestingly, during the process of revision, giving a privilege was first acknowledged to belong to those with executive power; however, this was later changed.[102] J.M. Huels notes that the fact that an act of executive power is given by a legislator is based on the fact that in the Church there is no separation of powers—no absolute separation between the powers exercised by distinct titulars. He concludes that there "is no reason why a privilege could not be an act of executive power, albeit reserved to a legislator or to an executive authority who has been granted this power […]."[103]

General executory decrees are by canon 31 §1 defined as: "decrees which define more precisely the manner of applying a law, or urge the observance of laws." This definition, coupled with §2 that binds the promulgation of general executory decrees to the provisions in canon 8, links these general decrees to laws in general and legislative activity. It is a concrete example of application or observance of law in the community.

[98] HUELS, "Determining," p. 7.
[99] HUELS, "Privilege," p. 215.
[100] MENDONÇA, "Commentary on cc. 1-95," p. 4.
[101] *Ibid*., p. 220.
[102] Cf. *Comm*, 19 (1987), p. 33; *Comm*, 23 (1991), p. 40; *Comm*, 23 (1991), pp. 194-196.
[103] HUELS, "Privilege," p. 221.

Because of this, it has been argued that this type of act has an executive function with a legislative purpose. General executory decrees, in offering interpretations and/or explanations of law or urging that a law be respected and observed is an example of how the executive function serves the legislative function. H. R. Moodie notes that, unlike executive acts but similar to legislative acts, these do not apply the law to individual circumstances but give supplementary norms for the application of laws.[104] However, this does not change the fundamental nature of this act: it is an act of executive power. This is affirmed by canon 31 §1: those who may give these decrees are those "who have executive power." As Mendonça concludes: "they are of an administrative, not a legislative nature"[105] (emphasis in the original).

4.4 — Canon 135 §4 on Executive Power

The final paragraph of the canon has no independent content—it only refers to the following canons for a further description of the exercise of executive power of governance. It is noteworthy that the call to abide by the norms of law, specifically mentioned in §2 (on legislative power) and §3 (on judicial power), is not mentioned when dealing with executive power. Although this would not excuse the one exercising executive power from following the law, it seems strange that such an important point would be included in only two of the three expressions. H. Socha notes that canons 136-144 order the exercise of executive power but that "it should be noted that canons 140 §§1-2 and 141-143 not only concerns *potestas exsecutiva*, but also *potestas legislativa* and *iudicialis*." Canons 140-143 may, therefore, be said also to apply to legislative and judicial power. However, as canons 140-142 concern delegation—which according to canon 135 §2-3 apply to these two expressions only in a limited fashion. As a result of this, the canons that strictly apply to executive power alone are canons 136-139 on territory, delegation, interpretation and the hierarchy of titulars of executive power respectively. These canons, however, do not substantially change the nature of executive power in relation to the two other expressions.

4.5 — The Role of Executive Power

Executive power seeks to implement or make clear in the life of the community the law as it has been promulgated, in order to meet a specific need

[104] Cf. MOODIE, "The Administrator," p. 47.
[105] MENDONÇA, "Commentary on cc. 1-95," p. 26.

in the community—a real public necessity.[106] Beyond this general point, it is challenging to articulate in a few phrases the role of this power, as it is difficult to define executive power of governance. In noting the manifold nature of executive power, C. Cardia describes it as being the power that "encompasses that vast array of activity that concern itself with the administrative organisation of the Church and the functioning of this organisation."[107] This definition underscores the important point that the nature of executive power is more complicated to pin-point than the other two expressions. This is largely because it may encompass almost every aspect of the life of the particular Church, other than legislative and judicial activity.

Within the particular Church this becomes even more accentuated, as every particular Church is different, based on the specific situation of the diocese. Therefore, executive power seeks to relate the many fields or competences it concerns to the situation of the actual particular Church within the norms of law. This becomes the pastoral side of executive power: through the discretion that is proper to it and the great variety of concrete expressions within the life of particular Church, this distinction of the power of governance brings to the reality of the diocese the complete pastoral ministry of the Church.

5 — Judicial *Power*

Judicial power is in its essence about giving *sentences*, which "concretely recognise and protect the rights established by law, dispose the means and also apply penal sanctions […] and at the same time established the corresponding obligations."[108] As such, it is the power in the Church that carries out what canon 1400 §1 calls *trials*, namely: the judicial process that seeks "(1°) to pursue or vindicate the rights of physical or juridical persons, or to declare juridic facts; [or] (2°) to impose or declare penalties in regard to offences." In this canon, judicial power is presented under three key headings: a) it concerns itself with the application of law within the procedural system of the Church tribunals, and b) in so doing makes use of the law—as set by legislative power—to c) determine singular cases or controversies that are submitted for judgement. This power seeks to pursue the rights of

[106] Cf. LABANDEIRA, *Trattato di diritto*, p. 9.
[107] CARDIA, *Il governo della Chiesa*, p. 46.
[108] SARZI SARTORI, "I vicari del vescovo," p. 10.

persons, to vindicate the rights of persons, to declare juridical facts and to impose or to declare penalties.[109]

The result of exercising judicial power is "an imperative juridical act, the fruit of the will of the judge, by which act a question of law is resolved by the force of legal truth."[110] This is done from a position of objectivity, impartiality and independence: the judicial decision is based on objective law, not on subjective criteria. Canon 16 §3 makes the clarification that "an interpretation by way of a court judgement […] does not have the force of law. It binds only those persons and affects only those matters for which it was given." Those who have judicial power of governance, within the provisions of this canon, may carry out a limited—though actual—interpretation of law. However, such a judicial interpretation—applicable only to the case at hand—is not law (different from legislative power).

5.1 — Canon 135 §3 on Judicial Power

The third paragraph establishes three fundamental principles: a) judicial power is possessed by judges and judicial colleges, b) it must be exercised in the manner prescribed by law, and c) it may be delegated only in relation to certain preparatory acts. "Judges and judicial colleges" in the Church are governed by canons 1417-1445, based on which of the three grades of tribunals the judge or the judicial college belong to. The diocesan bishop may exercise judicial power—within the context of c. 135 §3—as the first judge of the particular Church entrusted to his care (cf. c. 1419 §1).

Canon 135 §3 excludes delegation of judicial power of governance by judges and judicial colleges. The exercise of judicial power in the Church normally pertains to the ordinary power of the judicial vicar, associate judicial vicar and the diocesan judges. The matter of delegation of judicial power, which the canon allows only as far as applies to "the performance of acts preparatory to some decree or judgement," raises an important question as to the nature of these acts that prepare the way for the true acts of judicial power, the decrees and sentence of a judicial process. Are these preparatory acts expressions of judicial power at all?

To answer this question, C. Bernardini has argued in favour of a twofold judicial power of governance: *potestas cognoscendi* and *potestas definiendi*.[111] According to this distinction, what is identified in canon 1400 is

[109] Cf. Onclin, "The Church Society," p. 14.
[110] Labandeira, *Trattato di diritto*, p. 5.
[111] Cf. Bernardini, "De administratione tribunalium," pp. 450-451.

the *potestas definiendi*, which may not be delegated. The second form of judicial power—concerning the various preparatory acts that surround or make possible the *potestas definiendi*—is the *potestas cognoscendi*, which may be delegated.[112] Another attempted answer is offered by J. García Martin and N. Gallucci. They conclude that the preparatory acts are expressions of executive power rather than judicial power, which means that "judges and the ecclesiastical tribunal have both judicial and executive power."[113] F. Viscome concurs with this point, concluding that in the Code "the administrative power in judicial matters appears extensive."[114]

According to a narrow reading of canon 1400 §1, these acts would not in themselves be defined as judicial activity, but according to canon 135 §3 they seem to be, as the paragraph concerns judicial power. This "judicial-executive" power is also seen in the various singular administrative acts carried out by those who according to the law possess judicial power. For example, the judge or the presiding judge of a collegiate tribunal may designate (appoint) an auditor to collect evidence in a case (cf. c. 1428 §1). In other words, the titulars of judicial power also possess executive power, as do the titulars of legislative power. From the wording of the canon and these commentators cited above, it may be concluded that the various acts that precede a judicial sentence are acts of executive power of governance, while they are exercised—as executive acts of governance—by titulars of judicial power (much like a privilege is an act of executive power, but is exercised by a legislator).

5.2 — The Role of Judicial Power

The scope of judicial power in the Church is—as the explanation of its nature or purpose—rather straightforward: it seeks to resolve controversies in accordance with canon 1400. However, it also encompasses a much wider field. The application of law by means of judicial power in the Church seeks to promote the mission of the Church within the values that lie at the heart of ecclesial community: including justice and mercy based in the revelation of God.[115] This is carried out through the protection of the rights of the

[112] Cf. J. GARCÌA MARTIN – N. GALLUCCI, "La potestà dei giudici e dei tribunali e il suo esercizio secondo il can. 135, §3," *FC* 11 (2008), pp. 37-38. (=GARCÌA MARTIN and GALLUCCI, "La potestà dei giudici")

[113] *Ibid*., p. 38.

[114] F. VISCOME, "Il Vescovo come giudice nella propria diocesi," *QSR* 16 (2006), p. 125.

[115] Cf. G. GHIRLANDA, "Perchè un diritto nella Chiesa? Un vero diritto […] sui generis," in *Per*, 90 (2001), pp. 410-411 (=GHIRLANDA, "Perchè un diritto").

faithful during the judicial process, declaring juridical facts, and imposing or declaring penalties.

In relation to this power, the crucial canonical term *equity* must be briefly considered. Canonical equity, which was called for in principle 3 on the revision of the Code,[116] is included in seven canons in *CIC 1983* (cc. 19, 221 §2, 271 §3, 686 §3, 702 §2, 1148 §3, 1752, although two of these refer to natural equity: cc. 271 §3 and 1148 §3). Pope Paul VI repeated the definition on equity of Hostiensius in his allocution to the Roman Rota in 1973: "justice tempered with the sweetness of mercy."[117] The application of this foundational principle of canon law in the Church ensures the fairness of the application of the procedural laws of the Church. In addition, this principle means that law in the Church becomes something more than mere legal paragraphs and rigid application. In his 2010 allocution to the Roman Rota, Benedict XVI affirmed the intrinsic connection between law and its judicial application and justice: "the Judge who seeks to be just and wishes to live up to the classic paradigm of "animate justice," has the grave responsibility before God and men of his function, which includes due timeliness in every phase of the process: "*quam primum, salva iustitia*." All those who work in the field of law, each according to his proper function, must be guided by justice."[118]

6 — Differences between the Three Expressions

Prior to discussing the various differences between the three expressions of the power of governance, a more basic point needs to be made, namely the fundamental connection between canon law and the exercise of power of governance on the one hand and justice on the other. This was clearly pointed out by Benedict XVI in his allocution to the Roman Rota in 2012.

> There exists another way in which the proper understanding of canonical law opens the road to an interpretative work which inserts itself into the search for the truth about the Law and justice in the Church. As I wanted to highlight to the Federal Parliament of my country, in the *Reichstag* of Berlin, true law is inseparable from justice. The principle is obviously valid also to the canon law, in the sense that it [canon law] cannot be shuttered

[116] Cf. PCCIC, "Guiding Principles," p. 79.

[117] PAUL VI, Allocution 1973, p. 119.

[118] BENEDICT XVI, Allocution to the Roman Rota; English translation, in *Newsletter*, 161 (March 2010), p. 10.

> within a merely human system of norms but must be connected to a just order of the Church, in which a higher law is in effect.[119]

Law seeks to articulate what is just, the *iustum* or *res iusta in se ipsa*.[120] Within the context of the pastoral mission of the Church, law seeks, directly or indirectly, through the declaration of what is right and just in an individual case, to establish rights, protect these rights and resolve conflicts within the community. This explains why the diocesan bishop is the first judge of his particular Church: he is charged with the *munus pastorale*, charged with the pastoral care of his flock, something that is hindered—if not altogether stopped—by conflict, uncertainty, arbitrariness and abuse, and the negligence of rights.[121]

A judicial sentence applies the concept of the *iustum* to the specific judicial question, determining which of the parties to a case has *right* on his or her side. *Apostolorum successores* 181 speaks of the diocesan bishop and the diocesan tribunal in these words: "The administration of canonical justice is a duty of grave responsibility that demands, first and foremost, a profound sense of justice, but also sufficient canonical expertise and experience." The article goes on to urge the diocesan bishop to show care in appointing the various officers of the tribunal.[122] Finally, executive power in its various juridical acts seeks to apply a law according to *justice*, or how this *right* is to be expressed in concrete situations. This expresses the common basis of the three expressions and the root of its unity, articulated by Pope Paul VI in his 1973 allocution to the Roman Rota: "Thus canon law is not simply a norm of life and a pastoral rule; it is also a school of justice, of discretion, and of charity in action."[123]

The term *ad normam iuris* is used 66 times in the 1983 Code. It describes the condition applied to a number of legal acts in the Code, whereby their exercise demands the adherence to other norms for legality. As a principle it is directly applied to legislative and judicial power in canon 135 (§§2-3), and in canon 391 §2 to all three forms of governance: legislative, executive, and judicial power. *Apostolorum successores* 62 underlines this: "The

[119] BENEDICT XVI, Allocution to the Roman Rota, 21 January 2012; English translation, in *Newsletter*, 169 (March 2012), p. 6.

[120] Cf. GHIRLANDA, "Perchè un diritto," pp. 394-395.

[121] Cf. C. DE DIEGO-LARA, "Independencia y dependencia judiciales en el nuevo codigo," in G. BARBERINI (ed.), *Raccolta di scritti in onore di Pio Fedele*, Perugia, 1984, vol. 1, pp. 417-418.

[122] Cf. A. VIANA, "El gobierno de la diócesis según Derecho en el directorio *Apostolorum successores*," in *IC*, 46 (2006), p. 650.

[123] PAUL VI, Allocution 1973, p. 115.

bishop, in guiding his diocese, should observe the principles of justice and legality, knowing that respect for the rights of all in the Church requires that everyone, including himself, be subject to canon law."

Commenting on this article, T. J. Green notes that "*AS* 62 affirms the principle of legality, that is, the bishop's need to respect rights as a servant of justice, which means his observing canon law, especially but hardly exclusively regarding Christian rights."[124] This text mirrors principle 6 on the revision of the Code, which centres on the exclusion of arbitrary use of power and outlined two reasons for the principle of legality: the necessity on the part of those who exercise the power of governance to submit themselves to the norms of law (juridical security and consistency in the canonical system—assurance of law) and the protection of rights.

> The use of power in the Church, however, must not become arbitrary, because natural law prohibits such arbitrary use of power, as do also positive divine law and the law of the Church itself. The rights of each and every faithful must be acknowledged and safeguarded, both the rights which they have by natural law and the rights contained in divine positive law, as also the rights which are duly derived from these laws [...].[125]

Ad normam iuris, defined as indicating a "determination of the course of action by the will of the legislator,"[126] is identified in canonical literature as the principle of legality. "By the principle of legality we mean the submission of authority to the law in the exercise of power in a manner that avoids both the abuse of power and an indifferent attitude in the exercise of authority."[127] It serves as a guarantee by establishing legal parameters for the carrying out of the various expressions of power, thereby excluding arbitrary exercise of this power and thus providing an effective protection of the rights of the faithful. As such "the principle of legality is foundational and integral to the canonical order […] It is as a principle that is applicable to the exercise of the power of governance, and indeed to all authority […]."[128]

W. L. Daniel further points out that legality as a juridical term "is used to refer to the extent to which a certain action conforms to the law." However, he continues, "the central characteristic of the canonical notion of legality, though, is its application to those in the Church who are entrusted

[124] T. J. GREEN, "The 2004 Directory on the Ministry of Bishops: Reflections on Episcopal Governance in a Time of Crisis," in *StC*, 41 (2007), p. 125 (=GREEN, "The 2004 Directory").
[125] *Com* 1 (1969) 82.
[126] DANIEL, "The Principle," p. 33.
[127] *Ibid*., p. 32.
[128] *Ibid*., p. 29.

with the power of governance […].”[129] J.M. Huels makes an interesting point in regard to the principle of legality, namely that it involves the subordination of executive power to legislation so “that acts emanating from executive authority be accorded a role subordinate to legislative.”[130] The same must be said concerning judicial power.

Legality in the canonical order, however, is not simply adherence to the norms of law. It includes a vital second aspect: a sense of juridical responsibility that guides the exercise of power. This juridical responsibility is founded on recognising the limits of that exercise set by law, and respect for the very exercise of power, its purpose, its end (*the salus animarum*), and that power exercised wrongly may harm rights and destroy faith in ecclesial governance. J. C. Herranz identifies such a view of power in the Church and its exercise as that of a “function or public office, constituted and exercised for the good of the community”[131] (emphasis in the original).

Holding power in the Church is ultimately based on serving the community, which includes a juridical responsibility to carry out properly the task of governance. Pointing again to the purpose behind a clear adherence to law, I. Zuanazzi concludes, “It is evident that if the directing criteria that authority are bound to follow are stricter and more precise, the more protected are the rights of the individual, who may have recourse through the given procedures [...].”[132]

J. Llobell argues that within the exercise of judicial power of governance, the following principles secure legality: the independence and stability of judges, a realistic organisation of the tribunals of the Church, providing a true functionality in the work of the tribunals with complementary norms, a clear distinction between judicial and administrative [executive] power, giving titulars of judicial power exclusive competence for the protection of rights, true publication of sentences, and a system of judicial representatives that truly aids the parties.[133]

These two aspects—adherence to the law and submission to the norm of law—are seen in all three expressions of the power of governance of the

[129] *Ibid*., p. 31.

[130] HUELS, “A Theory,” p. 341.

[131] J. C. HERRANZ, *Studi sulla nuova legislazione della Chiesa*, Milano, 1990, p. 122 (=HERRANZ, *Studi*).

[132] I. ZUANAZZI, “Il principio di legalità nella funzione amministrativa canonica,” in *IE*, 8 (1996), p. 53.

[133] Cf. J. LLOBELL, “Il sistema giudiziario canonico di tutela dei diritti. Riflessioni sull’attuazione dei princìpi 6° e 7° approvati dal Sinodo del 1967,” in J. CANOSA (ed.), *I principi per la revisione del Codice di Diritto Canonico. La ricezione giuridica del Concilio Vaticano II*, Milano, 2000, p. 521.

diocesan bishop. For example, the bishop must promulgate a law following the canons that govern this crucial point in legislative activity. Also, his submission to law will keep him from legislating on issues which belong to the superior legislator, or where superior legislation has enacted provisions that would stand contrary to the laws of the bishop. As H. Pree concludes: "the exercise of ecclesiastical power as juridical power aims to carry out justice and ensure its effective functionality in legislative, administrative and judicial power in favour of the *bonum commune Ecclesiæ*. The latter is not an end in itself, but a necessary means to the end (*salus animarum*)"[134] (emphasis in the original).

The fundamental differences between the three expressions of the power of governance may—on the other hand—be identified as being found their nature, application, and the acts by which the three are expressed.

6.1 — Their Nature/Purpose

The variations in the application of the three expressions in the life of the particular Church are based on the expression being general or singular in nature, and their temporal aspect, being applied in relation to the future, the present or the past.

6.1.1 — *Giving New Law or Applying Existing Law*

The most significant difference between the legislative expression and the other two is that legislative power gives new law for the entire community that apply to all situations for which the law was enacted, whereas executive and judicial power apply already enacted law or relate to specific situations or circumstances created by a law coming into force. "Legislative activity produces primary norms applicable in a universal way. Both administrative [i.e. executive] and judicial activity […] work within the limits of the law […] derived as applications of a primary norm of law."[135] A diocesan bishop who gives a particular law regarding parochial pastoral councils in the diocese (cf. c. 536 §1) and makes these obligatory for all parishes, creates for the community a new law through an acts of legislative power. After a time, seeing the need to further guide the implementation of the law, the diocesan bishop gives an instruction addressing the correct application of the law.

[134] H. Pree, "Esercizio della potestà e diritti dei fedeli," in *IE*, 11 (1999), p. 16.
[135] Moodie, "The Administrator," p. 47.

This second act—an executive act of governance—applies to the situation or particular situations that have occurred following the law coming into force and being put into practice.

F. J. Urrutia defines executive power in relation to legislative power as "a power to apply or carry out legislation. It is in this restricted sense that the Code distinguishes *administrative* (executive) acts from acts of a legislative character."[136] Executive power encompasses a wide spectrum of tasks "in the application of law to particular situations."[137] However, this leads also to a difference between executive power on the one hand and judicial power on the other. While executive power is to apply to a great variety of situations, judicial power is only applied when a single situation comes before the tribunals of the Church within the procedural system based on c. 1400 §1—it resolves concrete issues based in those laws.[138]

6.1.2 — *The Past, the Present, or the Future*

Legislative power falls under the latter: "Laws concern matters of the future, not those of the past […]" (c. 9); they provide norms in anticipation of future circumstances. This is connected with the general nature of legislative power: "acts which promulgate laws are never singular in nature […]."[139] Executive power applies to the situation as it exists at the time when it is applied, whereas judicial power is applied to a situation in the past that is brought to the ecclesiastical tribunal.

At the same time, P. Gherri argues that for all three expressions there is a similar process made up of three stages: acquiring knowledge, evaluating this knowledge, making a judgement based on the evaluation.[140] Each of the three expressions are based on either future situations (legislative power), a given situation that needs to be resolved (executive power), or a specific situation that requires a judicial resolution (judicial power). As such, they all require the gathering of information as to the situations that they are to direct or settle in some way. The second and third steps—evaluation and making a judgement—follow from the initial step and vary slightly in the three expressions: from the evaluation that the

[136] URRUTIA, "Administrative Power," p. 262.
[137] MOODIE, "The Administrator," p. 46.
[138] Cf. K. MÖRSDORF, "De relationibus inter potestatem administrativam et iudicialem in iure canonico," in R. BIDAGOR (ed.), *Questioni attuali di diritto canonico*, Roma, 1955, p. 407.
[139] DANIEL, "The Principle," p. 47.
[140] Cf. P. GHERRI, "Decidere e giudicare nella Chiesa," in *Ap*, 84 (2011), pp. 76-78, 82 (=GHERRI, "Decidere e giudicare).

diocesan bishop makes in anticipation of giving a law for his diocese to the formal sentence closing a penal case before the judicial vicar. Tied to this, P. Gherri holds that prudence plays a universal role in the various acts of governance.[141]

6.2 — Their Application

The application of the three expressions in the life of the Church differs in the possibility of delegation and in the various acts of governance set to carry out the expression.

6.2.1 — *Delegation*

Canon 135 highlights delegation as the major difference between the expressions. Canon 135 §2 makes it invalid to delegate legislative power below that of the supreme legislator unless the law provides otherwise. Canon 30 seems to question this as it allows for the delegation of power to give a general decree to one possessing only executive power. However, the condition given—authorisation in accordance with the law—would rule out such a delegation in light of canons 135 §2 and 391 §2 in relation to the diocesan bishop.

Whereas in the old Code, where the norms on delegation applied to all three expressions of power of governance (cf. CIC/17, c. 196), the norms in the new Code concerning delegation of executive, legislative and judicial power of governance "are now very different."[142] As for legislative power, other than in the case of the supreme authority, it may not be delegated unless the law provides for it. Judicial power cannot be delegated, with the exception of those preparatory acts prior to a decree or judgement (cf. c. 135 §3). The remaining canons on delegation in Book I, as stated explicitly by canon 135 §4,[143] deal with the delegation of executive power of governance. Therefore, whereas legislative power may not be delegated in the case of the diocesan bishop, and judicial may only be delegated in limited cases, executive power may—both in singular cases and for all cases—be delegated.[144]

[141] Cf. GHERRI, "Decidere e giudicare," p. 80.
[142] URRUTIA, "Delegation," p. 339.
[143] Cf. URRUTIA, "Delegation," pp. 339-340.
[144] Cf. G. BIER, "Commentary on cc. 386-430," in K. LÜDICKE et al. (eds.), *Münsterischer Kommentar zum Codex Iuris Canonici*, Essen, 1984ff., vol. 2, c. 391, n. 15.

6.2.2 — *The Different Acts of Governance*

The second distinction related to application concerns the acts that carry out the expression of the power of governance. W. L. Daniel notes that the acts of one who holds power of governance "must not contradict the law; but they need not be dictated explicitly by the law, unless this is clearly established in the law."[145]

As concerns acts of legislative power, the Code refers to laws and general decrees, which are "true laws and are regulated by the provisions of the canons on laws" (c. 29). The types of legislative acts, in a strict sense, share a common purpose: they give laws, thereby providing the community with an independent norm within the legal system, subject to the fundamental principles of the system of law to which it belongs, and which does not presuppose other laws. It has, as an independent norm, the highest juridical value. Therefore, it stands on the same level as all other laws in the system of law and finds its place within the system of law.

Executive acts are subordinate to laws. However, due to the fact that certain forms of the executive power enter the fields of both legislative and judicial power, some authors have argued that there are cases where it is difficult to clearly determine when an act is legislative and when it is executive.[146]

The principal judicial act—the sentence (cf. c. 1607)—settles a judicial controversy and is the carrying out of judicial power. After the giving of a sentence—a judgement—only a superior tribunal may overturn the decision of an ecclesiastical judge. Judicial acts are either a judicial sentence that closes a trial or a decree that closes a judicial procedure (judicial acts proper).

6.2.3 — *Discretion in Application*

There are also differences between the three expressions in regard to the limitations placed on them. This is also true regarding the amount of freedom in the exercise of the various expressions. In canonical scholarship, this amount of freedom or limitations imposed is most commonly referred to as

[145] DANIEL, "The Principle," p. 33.

[146] Cf. J. L. GUTIERREZ, "La potestà legislativa del Vescovo Diocesano," in *ICan*, 24(1984), p. 516. P. Amenta makes the following point: "Si deve infatti tener presente che la dottrina più autorevole ha evidenziato la reale, pratica difficoltà di determinare con esattezza quando un atto del vescovo debba essere considerato legge, e quando invece sia da considerarsi un atto amministrativo [...]." P. AMENTA, *Partecipazione*, p. 97.

discretion in exercising power. W. L. Daniel defines *discretion* in the exercise of ecclesiastical power as being "the portion of freedom which the legislator concedes to ecclesiastical authorities for discerning the most just or appropriate manner to apply the law in a particular case."[147] Yet, it is true that to each of the three expressions there pertains a degree of discretion. E. Labandeira notes that the 1983 Code, through the Latin terms *opportunus*, *conveniens*, *utilis*, *expedire* and *suadere*, makes normative a certain directionality in the exercise of power.[148] This echoes the call of principle 3 on the revision of the Code: "the good of the universal Church evidently demands that the norms of any future Code should not be too rigid […]," allowing for more effective pastoral care.[149]

On one extreme is executive power, which is accorded the largest degree of freedom. This is so central to executive power that it remains one of the major characteristics of this expression of the power of governance.[150] Due to the spontaneity that is part of executive power, there needs to be a strict consideration when it is used, as this openness could lend itself to abuse. The nature of executive power of governance, which separates it from legislative or judicial power, means that to it belongs "a proper spontaneity, and therefore it is governed according to the principle of *proceeding in freedom*"[151] (emphasis in the original).

The titular of executive power makes law concrete in an individual case and is guided not by set procedures but through the use of *discretio et æquitatas*.[152] The initiative for acts of executive power may come from the law: the necessity of appointing a parish priest to a vacant parish (cf. c. 524); it may come from the holder of executive power: the diocesan bishop may give an instruction on the correct implementation of the diocesan statutes on parochial pastoral councils in the diocese (cf. c. 536 §1); or from the party: an elderly and infirm priest asks the diocesan bishop to dispense him from reciting the entire Divine Office (cf. c. 276 §2, 3°).

The legislator commands a certain freedom in giving laws for the community, as the number of obligatory laws that the diocesan bishop needs to give for the particular Church is limited. Judicial power—on the other

[147] DANIEL, "The Principle," p. 41.

[148] Cf. LABANDEIRA, *Trattato di diritto*, p. 186.

[149] PCCIC, "Guiding Principles," p. 268. It is interesting to note that whereas the original text speaks of the whole Church, the English translation uses the term *Universal Church*.

[150] Cf. LABANDEIRA, *Trattato di diritto*, p. 10.

[151] HERRANZ, *Studi*, p. 133.

[152] Cf. S. GOYENECHE, "De distinctione inter res iudiciales et administrativas in iure canonico," in R. BIDAGOR (ed.), *Questioni attuali di diritto canonico*, Roma, 1955, p. 423.

hand—is limited by two profound elements. Any expression of judicial power is dependent on a petitioner bringing a case, following the old axiom *Ubi nullus actor, ibi nullus iudex*. The holder of judicial power cannot initiate a case on his own.[153] Also, the titular of judicial power is bound to adhere to the strict parameters of procedural laws.

Conclusion

The threefold expression of the one *potestas regiminis* in the Church, as defined by canon 135, is both a testament to the historical links that bind Canon Law to civil law (in this case, civil constitutional law) and the distinct features that make Canon Law an independent system of law. Both civil law and Canon Law hold to an idea of governing power as being legislative, executive, and judicial, although they differ greatly as to the extent of distinction between them. Canon Law advocates one governing power expressed in three, while civil law advocates three governing powers. At the same time, both see the need for such a distinction or division to ensure the protection of individual rights and the safeguarding against abuses by those in power.

Canon 135 on the three expressions (emphasized and fortified by canon 391 on the power of the diocesan bishop) not only provides guidelines as to the carrying out of power but also gives significant insights into the nature of legislative, executive, and judicial power in the Church. In doing so, it mirrors profound truths about the nature of the Church: the formative role in the community played by legislative power—articulating the values, mission and goal of the community in binding norms –means that only the Pastors of the Church (the bishops: Pope, college of bishops and diocesan bishop), who have been placed in charge of the community, may exercise this power. Judicial power is bound to the rigors of the procedural system of law in the Church, as the fundamental values of justice call for resolutions of judicial controversies that not only declare what it rights in the individual situation, but reach such a conclusion in complete accord with the law. Executive power—unlike legislative and judicial power—being less susceptible to comprehensive definitions of its nature or scope (reflected in the variations in use of executive and administrative), is given significant freedom and discretion and equipped with a variety of juridical acts to address the manifold needs in the life of the (particular) Church.

[153] Cf. MÖRSDORF, "De relationibus," p. 402.

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EVANGELIZATION IN A POLYGAMOUS SOCIETY CANONICAL AND PASTORAL APPROACHES

PROSPER LYIMO*

SUMMARY — Polygamy poses some challenging canonical and pastoral problems for the Church in societies where it still exists. Some polygamists are attracted to Catholic Christianity and wish to convert but, to be accepted for sacramental initiation, they have to live according to the requirements of the Church's doctrine on marital unity and be prepared to give up deeply entrenched customs. This article focuses on canonical and pastoral approaches to evangelization in polygamous societies today. It explores how existing canonical structures in both the universal law and the particular Churches may be of service in supporting marital unity and the Church's mission of evangelization.

RÉSUMÉ — Dans les sociétés où elle persiste, la polygamie pose des défis canoniques et des problèmes pastoraux à l'Église. Certains polygames sont attirés par le christianisme catholique et désirent se convertir. Toutefois, pour être acceptés à l'initiation sacramentelle, ils doivent d'abord vivre conformément aux exigences de la doctrine de l'Église sur l'unité conjugale et être prêts à abandonner des coutumes traditionnelles profondément enracinées. Cet article se concentre sur les approches canoniques et pastorales de l'évangélisation dans les sociétés polygames d'aujourd'hui. Il explore la façon dont les structures canoniques en vigueur dans les deux lois, la loi universelle et celle des Églises particulières peuvent servir à soutenir l'unité conjugale et la mission de l'évangélisation de l'Église.

Introduction

Many people who consider becoming Catholics face challenges posed by Church doctrine and canon law. This is especially true of men and women

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in polygamous unions who may reject the possibility of conversion to Catholic Christianity because they believe that they are unable to extricate themselves from a polygamous union. This study treats the Church's mission of evangelization in polygamous societies, in particular, some canonical and pastoral approaches that support the Church's doctrine and mission to evangelize polygamous societies today. Although the focus of this study is on sub-Saharan Africa, much of the canonical and pastoral approaches explored have relevance in polygamous societies elsewhere. Polygamy in these societies is a socially approved and respected system with deep cultural roots, but it is contrary to the Church's constant teaching and canonical norms. Many of the people in these societies accept their polygamous culture and wish to maintain it; it is their heritage and age-old tradition. The practice of polygamy, therefore, poses some challenging canonical and pastoral problems for the Christian churches in polygamous societies, especially when polygamists wish to convert to Christianity.

From the Church's perspective, the practice of polygamy contradicts the unity of marriage; it negates the plan of God as revealed by Jesus Christ; and it is contrary to the equality and personal dignity of men and women who in matrimony give themselves to one another permanently with a love that is total and, therefore, unique and exclusive. While polygamists often are attracted to Catholicism and wish to be baptized, they find this very difficult because, for the husbands, it entails abandoning marital relations with their additional wives or, in the case of a wife, it may entail abandoning her husband and children. It is a real dilemma for them: to accept Christianity, they have to live according to the Christian way of life, which requires that they must give up certain deeply entrenched customs and cultural elements that are incompatible with Christianity, and this involves considerable social, familial, and personal sacrifice.

People in polygamous societies everywhere have the right to be evangelized, and it is the obligation of the Church to evangelize them. Indeed, this duty corresponds to the very purpose and ultimate objective of canon law, which is the *salus animarum*, the "supreme law" of the Church. Pope Benedict XVI noted three historical phases of evangelization.

> There are regions of the world that are still awaiting for a first evangelization; others that have received it, but need a deeper intervention; yet others in which the Gospel put down roots a long time ago, giving rise to a true Christian tradition but in which, in recent centuries—with complex dynamics—the secularization process has produced a serious crisis of the meaning of the Christian faith and of belonging to the Church.[1]

[1] BENEDICT XVI, Homily, in *L'Osservatore romano*, 26 (30 June 2010), p. 5.

This study is concerned with both first and second evangelization. There are areas of sub-Saharan Africa that still wait for a first evangelization, but many more that have been partially evangelized, with Christians living side by side with non-Christians, some of whom are in polygamous unions. The ministry of proclaiming the Good News, with the ultimate goal of converting polygamous families to Christianity, requires all agents of evangelization to employ canonical and pastoral approaches which are practical and in conformity with the Church's teaching. At the same time, these approaches may assist in dealing with the problems caused by polygamy so that individuals and families who want to become Catholics are in a better position to do so.

The study is divided into seven parts that have a common aim: to assist all agents of the Church and, indeed, all the Catholic faithful to make the apostolate among polygamists more practical; to carry it out more efficiently by involving key canonical organs and offices of the Church; and to make Church doctrine and law, especially on marriage, clearly understood and accepted by prospective converts. Part I explains briefly the concept of evangelization. Part II relates this to the notions of inculturation and the evangelization of cultures. Part III addresses the need to evangelize people in polygamous societies; the Church cannot ignore them but is obliged by divine law (Mt 28:18-20; Mk 16:15-16) to proclaim the mystery of Christ, and they in turn have the right to receive the message of salvation. In truth, they already possess seeds of divine truth which can enable them to respond favourably to the Christian message. Part IV treats various means of communicating the Good News that are found in canon law, both universal and particular, which can be of particular pastoral advantage in the evangelization of polygamous peoples. The focus of Part V is the diocesan pastoral plan, especially its key role in coordinating the evangelization and catechesis of polygamous families. Part VI treats the apostolate of women, which can be of significance in assisting women to become conscious of their dignity and rights so they are better prepared to resist the maltreatment and oppressive practices that are often endemic in polygamous societies. The seventh and final part is on the relation of justice and peace to the topic at hand.

1 — *Concept of Evangelization*

Evangelization is a complex process, a rich and dynamic reality which involves many elements, thus making it difficult to define completely in a

few words.[2] In his apostolic exhortation, *Evangelii nuntiandi* (*EN*), Paul VI examines the complexity of evangelizing action.[3] He points out that evangelization consists of various elements which must be taken into account.

> […] evangelization is a complex process involving many elements as, for example, a renewal of human nature, witness, public proclamation, wholehearted acceptance of, and entrance into, the community of the church, the adoption of the outward signs and of apostolic works. These elements may appear to be inconsistent and even mutually exclusive, but in fact they are complementary and perfect each other. Accordingly, it is essential to consider each element in relation to the others (*EN* 24).[4]

The mission of evangelization is not simply about recruiting new Church members. The fullness of salvation offered by the Church involves the wholeness achieved in lives lived in dedication and service to God's kingdom. The aim of the Church's mission of evangelization is not the expansion of the Church for its own sake. All men and women are invited into the Church so that they can join a community dedicated to preaching, serving and witnessing to God's reign.[5]

The Church has been called to be present among peoples of different cultures and human groups, including socio-cultural contexts in which Christ and his Gospel are not known and in areas where there are no Christian communities sufficiently mature to be able to incarnate the Gospel in

[2] See P. VADAKUMPANDAN, *The Concept of Evangelisation in the Apostolic Exhortation "Evangelii Nuntiandi" of Pope Paul VI: A Study in Perspective, against the Background of the 1974 Synod of Bishops and in the Light of Contemporary Trends in the Catholic Theology of Mission*, doct. diss., Rome, Pontifical Urban University, 1985, pp. 17-19.

[3] 8 December 1975, in *AAS*, 58 (1976), pp. 5-76. The pope writes: "Evangelization has been defined as consisting in the proclamation of Christ Our Lord to those who do not know him, in preaching, catechetics, baptism and the administration of the other sacraments. But no such defective and incomplete definition can be accepted for that complex, rich and dynamic reality which is called evangelization without the risk of weakening or even distorting its real meaning (*EN* 17).
"[…] evangelization is to be achieved, not from without as though by adding some decoration or applying a coat of colour, but in depth, going to the very centre and roots of life. The gospel must impregnate the culture and the whole life of man, […]. The gospel and, therefore, evangelization cannot put in the same category with any culture. They are above all cultures. […] The gospel and evangelization are not specially related to any culture but are not necessarily incompatible with them. On the contrary, they can penetrate any culture while being subservient to none" (*EN* 20). Translation in FLANNERY2, pp. 718-719.

[4] FLANNERY2, p. 721.

[5] S.B. BEVANS and R.P. SCHROEDER, *Constants in Context: A Theology of Mission for Today*, New York, Maryknoll, Orbis Books, 2004, p. 8. For detailed information on the origins of the Church as it emerges in the New Testament and the acceptance of mission anywhere and everywhere in the world, see ibid., pp. 10-19.

their own environment and proclaim it to other groups.[6] This apostolate is carried out by the Church by means of the proclamation of the life and teaching of Jesus Christ and through the celebration of the sacraments and other means of grace (*AG* 5, 9; *RM* 42-45). The immediate aim of this missionary activity is the "implanting of the Church," that is, the building up of particular churches in the midst of peoples who do not believe in Jesus Christ and among whom the Church has not yet taken root (*AG* 6, 23, 27; *RM* 33-34, 48-50; c. 786) and whose culture has not yet been influenced by the Gospel (*EN* 18-20; *RM* 34, 53-54). For this reason, the first proclamation of the Gospel differs both from the ordinary pastoral care of the faithful and from efforts aimed at renewal of Christian faith and life (*AG* 6).[7]

Evangelization, the mission of announcing the message of salvation (Acts 13:26), is the primary task of the Church. It takes place in various ways and in various stages depending on the diversity of the situations in which those who proclaim the message find themselves. Through the proclamation of the Gospel, which is the permanent priority of mission, faith comes into being when the message proclaimed is received (Rom 10:17). Kerygmatic preaching, that is, the first proclamation, must develop into faith conversion in those who have received the message of salvation. Conversion to the Lord is the work of the Holy Spirit. The human response must not be forced but must be free and sincere. The Church strongly defends the freedom of individuals in matters of religion.[8] No one must be forced to act contrary to his or her conscience in the process of conversion; the supreme law of conscience must prevail (*DH* 3; c. 748, §2).[9]

Proclamation calls for love and respect for those who listen, using language adapted to their situation and remaining in communion with the entire ecclesial community. Kerygmatic proclamation of the Good News occurs chiefly by means of preaching to or the catechetical instruction of those who have not yet received the message of salvation in Jesus Christ (*EN* 22). It is made with the intention of leading them to conversion of heart, repentance and faith (*AG* 13). This is followed by a deepening of the kerygma to those who, through conversion, have entered the catechumenate and are about to

[6] *AG* 5; JOHN PAUL II, Encyclical Letter *Redemptoris missio*, 7 December 1990, in *AAS*, 83 (1991), pp. 249-953, no. 33 [= *RM*].

[7] P. GIGLIONI, "The Evangelization Process: Kerygma to Local Church," in S. KAROTEMPREL et al. (eds.), *Following Christ in Mission: A Foundational Course in Missiology*, Boston, MA, Pauline Books & Media, 1996, p. 204.

[8] *AG* 13; *DH* 2, 4, 10; *GS* 21; cc. 748, 787, §2; *CCEO* cc. 586, 588.

[9] GIGLIONI, "The Evangelization Process," pp. 209-210.

complete the journey of Christian initiation (*AG* 14).[10] Evangelization is a process which begins with the first proclamation, continues with the catechumenate and growth in the faith, culminates with the celebration of sacramental initiation, and then is followed by an ever-deepening catechetical instruction, Christian living and authentic spirituality.

2 — *Inculturation and the Evangelization of Cultures*

In this part, we shall first treat briefly the meaning of inculturation as explained in the Encyclical Letter *Redemptoris missio*. There follows an exposition of the stages of the inculturation process, a brief explanation on how the Gospel should be inserted in the heart of polygamous families, the evangelization of cultures, incarnation of the evangelical messages within polygamous cultures, the purification of cultural traditions, discernment of the positive from the negative elements, and finally use of the valid elements.

2.1 — Meaning of Inculturation

Pope John Paul II, in his Encyclical Letter *Redemptoris missio*, states:

> As she carries out missionary activity among the nations, the Church encounters different cultures and becomes involved in the process of inculturation. The need for such involvement has marked the Church's pilgrimage throughout her history, but today it is particularly urgent.
>
> The process of the Church's insertion into peoples' culture is a lengthy one. It is not a matter of purely external adaptation, for inculturation 'means the intimate transformation of authentic cultural values through their integration in Christianity and the insertion of Christianity in the various human cultures.' The process is thus a profound and all-embracing one, which involves the Christian message and also the Church's reflection and practice. But at the same time it is a difficult process, for it must in no way compromise the distinctiveness and integrity of the Christian faith.
>
> Through inculturation the Church makes the Gospel incarnate in different cultures and at the same time introduces peoples, together with their cultures, into her own community. She transmits to them her own values, at the same time taking the good elements that already exist in them and renewing them from within. Through inculturation the Church, for her part, becomes

[10] Ibid., pp. 205-206.

> a more intelligible sign of what she is, and a more effective instrument of mission (*RM* 52).[11]

Inculturation "reveals a fresh approach to the evangelization of cultures."[12] The process whereby catechesis takes flesh in various cultures includes two dimensions: on the one hand, the ultimate transformation of authentic cultural values through integration in Christianity and, on the other, the insertion of Christianity in the various human cultures. Thus, one can speak of inculturation *ad extra* and inculturation *ad intra*.[13] Inculturation refers to the unique presence of the Christian experience within the culture of the people in whose midst the Church takes root. This presence is realized in a process of dialogue, "in which the Christian community takes on the values of local people, develops them in a truly Christian sense and leads them to a more universal communion."[14] It is a requirement of evangelization and a path towards full evangelization that will enable the Church to bring out its full message of justice and peace.[15] "Inculturation makes evangelization begin at the very depths of hearts and customs."[16] It is therefore necessary that during the work of evangelization in polygamous societies, one takes into account the positive elements of their culture. However, without proper inculturation the approach to polygamous families will remain difficult. Therefore, a proper inculturation is needed to approach the problem.

2.2 — The Stages of the Inculturation Process

There are three main stages in the process of inculturation. The first stage consists in the Christian life and message becoming present within a given

[11] Translation in *Encyclical Letter Redemptoris missio of the Supreme Pontiff John Paul II on the Permanent Validity of the Church's Missionary Mandate*, Boston, Pauline Book & Media, 1999, p. 69.

[12] H. CARRIER, *Evangelizing the Culture of Modernity*, New York, Maryknoll, Orbis Books, 1993, p. 64.

[13] "Inculturation *ad extra*" indicates the impact of evangelization on the culture of the people who receive the Gospel while "inculturation *ad intra*" refers to the effect in the life of the Church as a result of its presence within a new culture. A.A. ROEST CROLLIUS, "Inculturation," in S. KAROTEMPREL et al. (eds.), *Following Christ in Mission: A Foundational Course in Missiology*, Boston, MA, Pauline Books & Media, 1996, pp. 150 and 152.

[14] Ibid.

[15] See J.P. MBYEMEIRE, *A Theological Analysis of the Problem of Justice and Peace: The Contribution of the Special Synod for Africa and the Church in Uganda*, Rome, Pontificia Universitas Urbaniana, 1997, p. 6.

[16] SYNOD OF BISHOPS: SPECIAL ASSEMBLY FOR AFRICA, *The Church in Africa and her Evangelizing Mission towards the Year 2000 « You Shall Be My Witness »*, Vatican City, Vatican Press, 1993, p. 45.

culture. This stage coincides with the beginning of evangelization and the formation of a group of faithful in a given cultural area. This beginning means a period of learning about the values of a new culture. The openness and receptivity to these values is necessary for the work of evangelization. The second stage occurs when the local Church has gained sufficient ability in understanding the various elements of the local culture and also a degree of competence in expressing the Christian message on various levels of this culture. This begins the stage of transformation. With regard to inculturation *ad extra*, the effects of evangelization on the culture are now becoming evident. Regarding inculturation *ad intra*, this entails a long process of discernment, purification and creation of new forms to adequately explain and express elements of the Church's tradition. The third stage begins with the establishment of a new communion. This communion is to be found on the level of the local Church in its communion with the culture, and then it opens itself to all humanity.[17]

2.3 — The Gospel in the Very Heart of Polygamous Families

> The gospel becomes relevant and reliable when it is communicated to people through their own culture. The Word was incarnated in a given cultural context. He must be reincarnated in a specific culture and find appropriate human response through it. Therefore the gospel is received, experienced, affirmed and proclaimed through a culture. Culture plays a crucial role in the God/humanity dialogue.[18]

The Gospel is experienced and expressed in different ways and at different times. While God's self-revelation first took place in Judaic culture, Pentecost was the manifestation of God's impartial action in all cultures. Since Pentecost, the Gospel has taken root in many cultures. Church history reveals that any authentic response to the Gospel has always been contextual. In fact, the Gospel is contextual by its very nature. The Christ-event is the saving event of God and, as such, pertains to all humanity and creation. The uniqueness and universality of the Gospel is experienced and continuously affirmed in the diversity of cultures. This is its strength. The Gospel makes the Church a confessing community of the faith in many cultures. Secondly, the Gospel should not simply be transmitted from one culture to the other; it must be reincarnated. Being God's saving act in the life of

[17] ROEST CROLLIUS, "Inculturation," p. 152-153.

[18] I. ARAM, "The Incarnation of the Gospel in Cultures: A Missionary Event, Geneva, 1995," in J.A. SCHERER and S.B. BEVANS (eds.), *New Directions in Mission and Evangelization 3: Faith and Culture*, New York, Maryknoll, Orbis Books, 1999, pp. 31-32.

human beings, the Gospel must be fully re-owned by people in and through their own cultural forms, patterns, norms and values. The Gospel deals with God/humanity relations; therefore it cannot be isolated from the concrete world. It has to become incarnate in the life of human beings and the community. The issue is how to incarnate the Gospel in the cultural context of a polygamous culture and make it a transforming reality, bringing it into dialogue to express the universality of Christian marriage. Thirdly, the Gospel should cross all human frontiers and be taken to all people, cultures and lands. The Gospel is not only a reality to be lived in (in-reach), but also a reality to be taken out (outreach). However, crossing frontiers must be accompanied by respect and sensitivity to the cultural values and norms of the other. Fourth, the Church cannot exist without some form of inculturation, but it is never exhausted by any particular culture. It always transcends culture. God assumed humanity in a particular culture to restore it to its authenticity. The blind identification of the Gospel with a particular culture is the negation of the very nature of the Gospel. Christ meets us in our own cultural contexts. He is confessed through specific cultural patterns and forms. The Gospel is affirmed through cultures and not in cultures. Culture is only an instrument, framework and context to embody and articulate the Gospel. How can we go beyond the Jesus of history, who is so deeply rooted in our cultures, and identify ourselves with the Christ of faith? The Gospel creates a dynamic dialogue of cultures and finally leads people to one Christ through cultural diversities.[19]

Inculturation as a profound insertion of the Gospel in the very heart of a determinate culture[20] enables the fertile seed of the faith to germinate, develop and bear fruit according to the potentiality and peculiar character of that culture. Through inculturation, the Church can make the Gospel incarnate in polygamous cultures and at the same time introduce peoples into her community. In approaching polygamous families, one must consider seriously their myths, customs, rituals, prayers and songs. For example, some polygamous societies believe that death is absolute and final. By examining with them their myths of the origin of death, its coming through man's sin, we can move to the Good News that God not only did not abandon his original plan but actually sent his Son to announce and effect the restoration of the possibility of everlasting life. In this way, inculturation will be meaningful to them, deepen and strengthen their faith, and embrace it through personal commitment.

[19] Ibid., pp. 32-34.

[20] V. Mosca, "Diritto liturgico e inculturazione. Orizzonti teologici, normativi e pastorali," in *Inculturazione, diritto canonico e missione*, Rome, Urbaniana University Press, 2003, p. 123.

The Gospel of Christ can enter into communion with all the various cultures, be incarnated, lived and expressed in each of them (*RM* 52). In fact, it can be adapted to and expressed in any form of healthy human culture. The Church can use all of human culture to make the Gospel message penetrate into hearts of people. Through inculturation, it is easy to approach the culture of the polygamous families in such a way that they are enabled from within themselves to be fertile because, as the synod of bishops said: "Christianity becomes itself enriched when through inculturation it enters into dialogue with peoples and with their cultures."[21]

2.4 — The Evangelization of Cultures

The expression "evangelization of cultures" expresses one aspect of the process of inculturation, that is, the impact that the preaching of the Gospel has on the cultures of humanity.[22] Speaking about the evangelization of cultures, Pope Paul VI said: "Evangelization is to be achieved, not from without as though by adding some decoration or applying a coat of colour, but in depth, going to the very centre and roots of life" (*EN* 20).[23] On the other hand, Pope John Paul II emphasized the need to address cultures. He said: "The synthesis between culture and faith is not just a demand of culture, but also of faith. A faith which does not become culture is a faith which has not been fully received, not thoroughly thought through, not fully lived out."[24] Inculturation, therefore, is an inseparable aspect of evangelization.[25] It means the presentation and re-expression of the Gospel in forms and terms proper to a culture—processes which result in the reinterpretation of both, without being unfaithful to either. Inculturation is a creative development which, as the International Theological Commission pointed out, participates in the dynamism of cultures and their intercommunication.[26] Inculturation means both that the Gospel

[21] SYNOD OF BISHOPS: SPECIAL ASSEMBLY FOR AFRICA, *The Church in Africa and Her Evangelizing Mission towards the Year 2000*, p. 43.

[22] ROEST CROLLIUS, "Inculturation," p. 151.

[23] FLANNERY2, p. 719.

[24] As quoted in *L'osservatore romano*, 15 (28 June 1982), p. 7.

[25] The evangelization will be complete if it takes account of the increasing interplay of the Gospel and people's concrete lives (*EN* 29).

[26] INTERNATIONAL THEOLOGICAL COMMISSION, "Faith and Culture," *Omnis Terra*, no. 198, 1989, p. 264; P. ARRUPE, "Letter to the Whole Society on Inculturation," in J. AIXALA (ed.), *Other Apostolates Today*, vol. III, Saint Louis, Institute of Jesuit Sources, 1981, p. 172.

challenges cultures and that culture re-expresses the Gospel.[27] The Church is aware that culture is a reality to be evangelized and that is why it is called to listen carefully to people in order to understand them and find the right words to bring the originality of the Gospel message to people by trying to penetrate and reach the soul of different cultures and respond to their expectations by making them grow in the dimension of faith, hope and Christian charity. Evangelizing cultures goes parallel with criticizing and denouncing everything in a culture that contradicts the Gospel and is opposed to the dignity of a person in his or her personal and community dimension.[28]

One of the consequences of inculturation is that both evangelizing and evangelized cultures mutually influence each other. This is a normal outcome of the intercultural process. It is to be expected that evangelized cultures acquire culture traits from the evangelizers, reinterpret them, and integrate them within their own authentic systems. It is also expected that evangelizing cultures are enriched in their turn by the new cultural expressions of Christianity they have provoked.[29]

2.4.1 — *The Incarnation of the Evangelical Message in Polygamous Cultures*

The incarnation[30] of the evangelical message in polygamous cultures is a real and proper requirement of the message itself which is addressed to

[27] A. SHORTER, "Inculturation: Win or Lose the Future," in J.A. SCHERER and S.B. BEVANS (eds.), *New Directions in Mission and Evangelization 3: Faith and Culture*, Maryknoll, NY, Orbis Books, 1999, p. 55.

[28] E.P. PACELLI (ed.), *International Secretariat of the Pontifical Missionary Union*, Rome, Propaganda Fide, 2010, p. 169.

[29] *EN* 63-64.

[30] Incarnation can be described as the mystery of the Second Person of the Blessed Trinity's becoming man, the mystery of Jesus Christ's being God and man, the mystery of His being God-Man. The word Incarnation (from the Latin *caro*, flesh) means the putting on or the taking on of flesh. "Καὶ ὁ λόγος σαρξ ἐγένετο"—"And the Word was made flesh" (Jn 1:14). The word Incarnation may refer to the Word's becoming man; thus it would mean the operation by which the Triune God, forming a determined human nature in the womb of the Virgin, elevated it and efficiently united it to the Second Divine Person. The word *Incarnation* may also refer to the resultant union; thus it would mean the wondrous, singular, and eternally permanent union of the divine nature and the human nature in the one Person of the Word. E.A. WEIS and J. WALSH (eds.), "Incarnation," in B.L. MARTHALER et al. (eds.), *New Catholic Encyclopedia*, vol. VII, 2nd ed., Detroit, Thomson/Gale, 2003, p. 373.

everyone, since all have been called to the messianic salvation.[31] Polygamous families are profoundly linked to a strong culture, and the building up of the Kingdom of God cannot avoid borrowing the positive elements of human culture or cultures of those to whom are destined the Gospel and the Reign of God proclaimed by it. These people have the fundamental right to hear the Word of God as far as the salvation of their souls is concerned, to live it and express it, according to their native social-cultural categories. In other words, it is their right to reach Christ, to know him and to love him according to their particular way of being, thinking and acting, remaining true to themselves without losing anything of their proper identity.

Polygamous families are to be instructed very carefully so that they can understand that, with the incarnating of the Gospel in their culture, the Church by no means seeks to destroy that culture. For polygamous families, to accept the Christian message does not signify for them the renunciation of their own personalities or of the culture that has formed them. The Christian faith does not address itself to the renunciation of any value which is authentically human, because all that is authentically human is already profoundly Christian. The incarnation of the divine message of the Gospel in the customs and culture of people has been encouraged by popes and many Catholic theologians. For example, during his address to the bishops of Zimbabwe on their *ad limina* visit in 1982, Pope John Paul II repeated what he said during his pastoral visit to Nigeria.

> The Church truly respects the culture of each people. In offering the Gospel message, the Church does not intend to destroy or to abolish what is good and beautiful. In fact she recognizes many cultural values and through the power of the Gospel purifies and takes into Christian worship certain elements of people's customs. The Church comes to bring Christ; she does not come to bring the culture of another race. Evangelization aims at penetrating and elevating culture by the power of the Gospel.[32]

The Church, living in diverse situations in the countries of sub-Saharan Africa, has the duty to explain the message of Christ in her preaching to diverse cultures and to all people. In this way the people can more readily probe it, more deeply understand it, and give it better expression in liturgical celebrations and in the life of the diversified community of the faithful (cf. *GS* 44 and 58). This adaptation of the preaching of the revealed Word must be taken as a mode of all evangelization (*LG* 13 and 17) so that it might be authentic and efficacious.

[31] Cf. MOSCA, "Diritto liturgico e inculturazione," pp. 118-119.

[32] JOHN PAUL II, Allocution, 18 June 1982, in *L'osservatore romano*, 15 (28 June 1982), p. 4.

Proclaiming the Gospel, the Church procures whatever good is in the minds and hearts of people, whatever good lies latent in the rites, customs and cultures of diverse peoples. This is not only saved from destruction but is also purified, strengthened, raised up, healed, ennobled and perfected unto the glory of God (*LG* 13 and 17). The Church emphasizes the catholicity of the People of God at the same time as she tends to centralize all humanity in Christ, the head of creation, in the unity of his Spirit (*LG* 13). Therefore, far from destroying or impoverishing the cultures of the peoples, the Gospel of Christ raises them, perfects them, renders them fruitful from within, strengthens them, completes them and restores them in Christ (cf. *LG* 13 and 17; *GS* 58).

2.4.2 — *The Purification of Cultural Traditions*

In a polygamous culture, as in all cultures, there are both negative and positive elements, and this applies equally to religious traditions which may be in need of renewal and perfection. "Inculturation facilitates not only the integration of cultural values but also the purification of those elements not in keeping with the exigencies of the gospel."[33] It "is written into the very logic of the incarnation. God became man so as to share with man his plan of salvation (I Tim 2:4). In this way the gospel finds expression in the genius of a people, and will continue to find expression in the genius of every people that accepts it."[34]

The Gospel always provokes, by reason of its very nature, an explosion of profound renewal in the life of people and necessarily also in their cultures. The evangelical message renews and perfects the religious-cultural traditions of the peoples and purifies them from those elements which may possibly be incompatible with the Gospel. It discerns in them the positive elements from the negative elements. This means that those elements which are not in contradiction with the Christian religion and which, in consequence, can be assumed as an expression of it, are taken positively. On the other hand, those which are incompatible with the evangelical message cannot be assumed by it. It is of these latter elements that cultures are to be purified. The purification of cultural traditions is nothing other than their participation in the redemptive mystery of Christ. They are thus rendered participants of that newness introduced by Christ into the world by his death and resurrection.

[33] Synod of Bishops: Special Assembly for Africa, *The Church in Africa and her Evangelizing Mission towards the Year 2000*, p. 44.

[34] Ibid.

2.4.3 — *Discernment of the Positive Elements from the Negative Elements*

Separation of the good from the bad in a culture's values and way of life, its institutional patterns, its goals and accomplishments demands a principle of discernment. When the evangelizer looks for such a principle, he or she reaches for the Gospel as interpreted by the faith of the Church.[35] Pope John Paul II, in his Encyclical Letter *Redemptoris missio*, mentions two basic guidelines in incarnating the Gospel in peoples' culture.

> In this regard, certain guidelines remain basic. Properly applied, inculturation must be guided by two principles: 'compatibility with the gospel and communion with the universal Church' [*FC* 10]. Bishops, as guardians of the 'deposit of faith,' will take care to ensure fidelity and, in particular, to provide discernment, for which a deeply balanced approach is required. In fact there is a risk of passing uncritically from a form of alienation from culture to an overestimation of culture. Since culture is a human creation and is therefore marked by sin, it too needs to be 'healed, ennobled and perfected' [*LG* 17].[36]

The process of inculturation must constantly take into account the positive elements from the culture of polygamous families because these elements form part of their heritage. It must then establish a relationship between these elements and those of Christianity.

Regarding the inculturation of marriage, however, there is a need to evaluate the various marriage customs and take into account the distinction between the essential values or elements and the external rites of marriage, as well as the two key-principles: compatibility with the Gospel and communion with the universal Church. Polygamy, however, always radically contradicts the unity of Christian marriage. The negative elements in polygamous culture, such as discrimination and oppression of women, disunity, infidelity, jealousy and marrying girls who are below the legal minimum of age, cannot be inculturated, since they are incompatible with the content of genuine Christian marriage and canonical norms. In the case of such negative elements or customs, the task of discernment and purification is therefore necessary.

2.4.4 — *Use of Precious Cultural Gifts*

"The process of inculturation must constantly take into account the positive elements of African Traditional Religion."[37] In sub-Saharan Africa

[35] F. GEORGE, "Evangelizing Our Culture," in S. BOGUSLAWSKI and R. MARTIN, *The New-Evangelization: Overcoming the Obstacles*, Mahwah, NJ, Paulist Press, 2008, pp. 44-45.

[36] *RM* 54; *Encyclical Letter Redemptoris missio*, p. 71.

[37] SYNOD OF BISHOPS: SPECIAL ASSEMBLY FOR AFRICA, *The Church in Africa and her Evangelizing Mission towards the Year 2000*, p. 56.

there are many precious gifts of different cultures—for example, traditional songs (tribal melodies), vessels, vestments, stories, proverbs, saying and riddles, dialogue, vocabulary, ritual symbols, musical instruments, drum strokes, hand claps, traditional dancing and body language.[38] These precious cultural gifts should be used in faith instruction (evangelization) after being studied by the diocesan pastoral council (inculturation committee) and being approved by the local ordinary.

> This kind of process needs to take place gradually, in such a way that it really is an expression of the community's Christian experience. As Pope Paul VI said in Kampala: 'It will require incubation of the Christian 'mystery' in the genius of your people in order that its native voice, more clearly and frankly, may then be raised harmoniously in the chorus of other voices in the universal Church.'[39] In effect, inculturation must involve the whole people of God, and not just a few experts, since the people reflect the authentic *sensus fidei* which must never be lost sight of. Inculturation needs to be guided and encouraged, but not forced, lest it rise to negative reactions among Christians. It must be an expression of the community's life, one which must mature within the community itself, and not be exclusively the result of erudite research. The safeguarding of traditional values is the work of a mature faith (*RM* 54, §2).[40]

The first step in this approach is trying to appreciate with them the goodness of what is there, to build on it, and to use whatever will help them understand what the Gospel means for them. The Church in sub-Saharan Africa should educate the agents of evangelization to examine, respect and love what is deepest and most valuable in the polygamous culture. Then, after critical analysis and study, those positive elements can be used without contradicting the fundamental faith and teaching of the Church. This is a better model and a proper methodology in mission to be utilized when evangelizing any polygamous group.

3 — *Evangelization in Polygamous Societies*

Although the Church achieved remarkable growth in sub-Saharan Africa in the twentieth century, there are still many millions of people who have never known Christ. Thus, the Church needs to continue its mission of

[38] J.K. Njino, R. Sesana and J.P. Kirby, *Communicating the Gospel Message in Africa Today*, Eldoret, AMECEA Gaba Publications, 1992, pp. 7-16.

[39] Paul VI, Allocution, 31 July 1969, in *AAS* 61 (1969), p. 577.

[40] *Encyclical Letter Redemptoris missio*, pp. 71-72.

evangelization. One cannot deny the activity of the Holy Spirit in the cultures of the sub-Saharan peoples even where the Church does not yet exist. These cultures already possess elements of Christian truth, which we call "seeds of the Word."[41] People of good will are influenced by the activity of the Holy Spirit and by these seeds of divine truth so that they are disposed to respond favourably to evangelization and to find expression for the Gospel in their culture.[42] This is a process which needs to be taken step by step starting with a first evangelization and followed by the pre-catechumenate and the catechumenate proper.[43] Each of these stages will be addressed in turn, drawing on the applicable liturgical laws and canons of the Latin Code. Nor does evangelization end with sacramental initiation but must continue with the ongoing Christian formation of the baptized.

3.1 — Preparatory Phase

In the preparatory phase, research is carried out, languages learned, contacts made, and the ground prepared for evangelization. It is a necessary step in first/primary evangelization and is inseparable from it.[44] This phase includes the activity of Christians who dedicate themselves to social or charitable works, dialogue concerned with moral and religious values, justice and peace, liberation, co-responsibility, or to the instruction of culture, particularly when the aforementioned aspects are inspired by Gospel values and the solicitude that all may know the love of God revealed in Christ.[45] The law of the Church

[41] Cf. Lk 8:11.

[42] A. SHORTER, *Evangelization and Culture*, London, Geoffrey Chapman, 1994, pp. 78-79.

[43] The following terms are used in the Code for the word "catechumenate" in its substantive forms: *praecatechumenatus* is used once in c. 788, §1 (*CCEO* c. 587, §§1 and 2); *catechumenatus* is used four times, in cc. 788, §1; 788, §3; 851, §1 and 865, §1; *catechumenus* is used six times, in cc. 206, §1; 206, §2; 788, §2; 788, §3, 1170; and 1183, §1.

[44] SHORTER, *Evangelization and Culture*, p. 75. Shorter points out: "Some years ago, a Catholic missionary society was beginning work among the nomads of northern Kenya. It was proposed to spend three to four years making contact with the people, studying them and researching their social and cultural life before beginning evangelization proper. This was an excellent suggestion, but it was pointed out to them that their very presence among the nomads was already the start of the evangelization process, which could not, in fact, be postponed once it had begun." Ibid., p. 23.

[45] B. HÄRING, *Evangelization Today*, Notre Dame, IN, Fides Publishers, 1974, p. 43; idem, *Faith and Morality in a Secular Age*, Slough, St. Paul Publications, 1973, pp. 207-217. Sometimes the term "pre-evangelization" conceals a false ideology which maintains that increased literacy, cultivation, technical progress, and social and political organisation are more urgent than evangelization and actually are a condition for it. According to HÄRING, pp. 43-44, those who think in this way hide the Gospel and have not yet been liberated by it and through it.

insists on the importance of dialogue in evangelization. "By the testimony of their words and of their lives, missionaries are to establish a sincere dialogue with those who do not believe in Christ so that, taking their native character and culture into account, ways may be opened up by which they can be led to know the good news of the Gospel" (c. 787, §1).[46]

In polygamous societies, evangelization predisposes the will of people for ready submission to Christian standards of conduct. Involvement in this effort is a fundamental duty of the people of God, as expressed in c. 781 (*CCEO* c. 584, §1).[47] This task does not belong only to the hierarchy or to foreign missionaries but also to the baptized natives because, by virtue of their faith in Christ, they too are called to be missionaries.[48]

> The activity of evangelization should be an integral part of the life of a baptized Christian, but this does not mean that the evangelizer acts alone. […] [C]ommunity-building is linked to evangelization; it is also true that evangelization is a community responsibility. Through the sacrament of baptism, a person is inserted into the Christian community and accepts the obligations which this community imposes. […] [T]he Christian community is both the outcome of evangelization and its driving force. The community is the agent of evangelization and the principal sign of its accomplishment.[49]

Evangelization in polygamous societies is a community responsibility which can be conducted by those who are deeply permeated by the Gospel and who are convinced of the priority of the kingdom of God over any social work and purely humanistic values. Hence, evangelization in polygamous societies is an apostolate which requires dedication and testimony to the Gospel.

3.2 — Primary/First Evangelization

Primary evangelization is the term used to refer to the early stages of evangelization of those who have not yet heard the Good News of

[46] The Latin text reads as follows: "Missionarii, vita ac verbi testimonio, dialogum sincerum cum non credentibus in Christum instituant, ut ipsis, ratione eorundem ingenio et culturæ aptata, aperiantur viæ quibus ad evangelicum nuntium cognoscendum adduci valeant (c. 787, §1).

[47] Cf. *AG* 2 and 35.

[48] Missionaries as ministers of the Gospel are believers in Christ who are sent for missionary activity by competent ecclesiastical authority. They may be lay men or women, members of religious communities or members of secular clergy (deacons, priests or bishops). These may include indigenous (natives) to the missionary area or from elsewhere, that is, non natives (cf. c. 784). See J.A. CORIDEN, "Missionary Action of the Church (cc. 781-792)," in *CLSA Comm1*, p. 561.

[49] SHORTER, *Evangelization and Culture*, p. 57.

the Kingdom.[50] Also called "first evangelization," it exists in situations in which Church implantation has not yet taken place. The local Churches, including those in sub-Saharan Africa, must establish and periodically renew their pastoral priorities for the evangelization of these societies, and primary evangelization must be among their first concerns.

> Primary evangelization should be a priority of local mission, as discerned by the local Church. [It] follows the path of interreligious dialogue. It seeks to discover what is of God in the cultural and religious traditions of the unevangelized. It looks for signs of the activity of the Spirit and for the elements of Christian truth […] It notes the various ways in which the people of these traditions yearn consciously or unconsciously for Christian fulfillment, and it calls them to repentance and conversion. At the appropriate moment, it identifies and names the hitherto unknown Christ, whose Spirit has been at work among them. It speaks to the human imagination about Christ and invites the people to learn about him and consciously to commit themselves in love and freedom to him.
>
> […] When the primary evangelization phase is complete, the new Christian community still needs nurturing, while it consolidates itself socially and culturally. It may even need a 'second wind' of primary evangelization, a boost—as it were—to keep it on course, even after it has developed ecclesial institutions.[51]

Pastoral care, or "pastoral evangelization,"[52] as well as "missionary evangelization"[53] are needed in polygamous societies. "Missionaries are to ensure that they teach the truths of the faith to those whom they judge to be ready to receive the good news of the Gospel so that, if they freely request it, they may be admitted to the reception of baptism" (c. 787, §2).[54] Those who express a desire to embrace the faith during the stages of first/primary evangelization, including polygamists, should be informed of what will be expected of them during their formation in the precatechumenate.

[50] Ibid., pp. 23 and 75.

[51] Ibid., p. 77.

[52] According to Shorter, pastoral evangelization, which is often simply called "pastoral care," means the activity of establishing God's Kingdom in the home community. SHORTER, *Evangelization and Culture*, pp. 62-65.

[53] Cf. CONGREGATION FOR THE CLERGY et al., Instruction on Some Questions regarding Collaboration of the Non-ordained Faithful in the Ministry of Priests *Ecclesiae de mysterio*, 15 August 1997, in *AAS*, 89 (1997), pp. 852-877; English trans. in *Origins*, 27 (1997-1998), pp. 397, 399-409.

[54] The Latin text reads as follow: "Curet ut quos ad evangelicum nuntium recipiendum æstiment paratos, veritates fidei edoceant, ita quidem ut ipsi ad baptismum recipiendum, libere id petentes, admitti possint" (c. 787, §2).

3.3 — Precatechumenate

According to the liturgical law of the Rite of Christian Initiation of Adults (RCIA), Christian initiation formally begins with admission to the catechumenate, but the preceding period of the precatechumenate is of great importance as well and should not be omitted. It is the time of evangelization in which those who are not yet Christians open their hearts to the Holy Spirit so that they may believe and be freely converted to the Lord.[55]

The whole period of the precatechumenate is set aside for evangelization so that the true desire to follow Christ and to seek baptism may mature (RCIA, no. 10). According to the liturgical law, "the episcopal conferences may provide, if necessary and according to the local circumstances, a method to receive interested inquirers," also called "sympathizers" (RCIA, no. 12). Such reception is optional and is done without any rite. It expresses the inquirer's sound intention rather than faith and should be adapted to local conditions and opportunities. It is to be carried out at meetings and gatherings of the local community in a setting of friendly exchange where the inquirer or sympathizer is presented by a friend and welcomed and received by the priest or by some other appropriate and worthy members of the community (RCIA, no. 12).

3.4 — Catechumenate

The catechumenate[56] can be defined as "a process by which catechumens, whether adults or children of catechetical age, are prepared for

[55] *Ordo initiationis christianæ adultorum*, 6 January 1972, editio typica, Typis polyglottis Vaticanis, 1972, no. 9. All quotations of the RCIA are from the 1982 ICEL copyrighted translation in *The Rites of the Catholic Church as Revised by Decree of the Second Ecumenical Council and Published by Authority of Pope Paul VI*, New York, Pueblo Publishing Co., 1983. ICEL published a significantly adapted version of the RCIA in 1985, but the earlier one is used in this thesis for consistency with the *editio typica* of 1972.

[56] The word *catechumenus* or catechumen, from which is derived the discipline of the catechumenate, has its roots in the New Testament though there is no direct mention of the term "catechumenate" in the New Testament writings. The same may be considered as derived from the word "*kathakheo*" which denotes information that comes to the attention of someone or a communication that one receives (for example, Ac. 12: 21-24). See P. MACHADO, *The Catechumenate and Its Canonical Implications: With Special Reference to Can. 788*, Rome, Pontificia Universitas Urbaniana, 1997, p. 2. For more information on the word "*kathakheo*," cf. W.F. ARNDT and F.W. GINGRICH (eds.), *A Greek-English Lexicon of the New Testament and Other Early Christian Literature*, 2nd ed., Chicago, The University of Chicago Press, 1979, pp. 423-424. It is used in a specific sense in the following texts: 1 Cor 14:19; Gal 6:6b; Rom 2:18; Acts 18:25; Lk 1:14.

baptism according to an organized method, which includes liturgical rites as well as instruction; also the state or order of catechumens, carrying canonically defined privileges."[57] The admission to the catechumenate takes place when the period of the precatechumenate has been completed and the candidates have been grounded in the fundamentals of Christian life and teaching.[58] During this period, the candidates are given pastoral formation and are trained by suitable disciplines (cf. *AG* 14). The preparation can take several months or sometimes even years. Regarding the period of preparation, the RCIA states:

> The catechumenate or pastoral formation of catechumens continues until they have matured sufficiently in their conversion or faith. If necessary, it may last for several years. By the teaching of the whole Christian life and by an introductory period of appropriate length, the catechumens are well initiated into the mysteries of salvation, in exercise of Gospel morality and in the sacred rites which are to be celebrated later on. In this way they are introduced into the life of faith, the liturgy and the charity of the people of God.[59]

Historically, an antecedent to the catechumenate may be found in Judaism, for instruction was required before an adult gentile was admitted to circumcision

"A catechumen is a person who, with the intention of becoming a Christian, undertakes a period of spiritual and catechetical formation in preparation for sacramental initiation into the church. Sometimes the catechumenate is spoken of broadly to include the period of the precatechumenate before the rite of acceptance into the order of catechumens. The term *catechumen* is also used at times in a strict sense to exclude the *elect*, those who have enrolled their names at the beginning of the second step in Christian initiation (RCIA, 118)." J.M. HUELS, *The Catechumenate and the Law: A Pastoral and Canonical Commentary for the Church in the United States*, Chicago, IL, Liturgical Training Publications, 1994, p. 5.

57 E. YARNOLD, "Catechumenate," in B.L. MARTHALER et al. (eds.), *New Catholic Encyclopedia*, vol. III, 2nd ed., Detroit, Thomson/Gale, 2003, p. 249.

58 M.A. O'REILLY, "The Missionary Action of the Church cc. 781-792)," in *CLSA Comm2*, pp. 947-948; *AG* 14; RCIA, no. 15.

59 RCIA, no. 98. RCIA, no. 20 states: "The period of time suitable for the catechumenate depends on the grace of God and on various circumstances, such as the plan of instruction to be given, the number of catechists, deacons, and priests, the cooperation of the individual catechumens, the means necessary to reach the place of the catechumenate and to live there, and help of the local community. Nothing can be determined a priori. The bishop has the responsibility of setting the period of time and directing the discipline of the catechumenate. After considering the conditions of their people and region (*SC* 64), Episcopal conferences should regulate this matter more specifically."
In extraordinary circumstances (special cases), when the candidate cannot go through all the stages of initiation and considering the spiritual preparation of the candidate, the local ordinary may decide to shorten the period of the catechumenate. In individual cases, he may allow it to take place in one celebration (RCIA, nn. 98, 240).

and proselyte baptism and, similarly, before the initiatory washing practiced by the Qumran community. In the Christian tradition, mention of the catechumen (*katēchoumenos*) and the catechist (*katēchōn*) occurs already in Paul (Gal 6:6).[60] The more immediate origin of the catechumenate was in the post-apostolic era. By the late third century it had developed into a full-fledged discipline for the preparation of those seeking to become Christian. The formation was thorough and well rounded, including doctrinal, spiritual, and moral aspects, leading up to the liturgical rites that sealed the catechumen's relationship with the Church.[61]

When Christianity became a state religion during the reign of Constantine and conditions for the spread of the faith were favourable, the catechumenate declined and experienced disintegration. It was restored completely after the Second Vatican Council and made mandatory with the publication in 1972 of the *Ordo initiationis christianæ adultorum*.

In light of its history, the catechumenate stands for the process or institution by which a person intending to receive baptism is prepared for the reception of this sacrament through catechesis, liturgical celebrations, and community living. The canons that refer to the catechumenate proper speak of admitting the candidates to the sacrament of baptism after having undergone a process. First, they must manifest the intention to receive baptism (cc. 851, 1°; 865, §1); second, they must have completed the precatechumenate; third, they are admitted to the catechumenate proper by means of a liturgical ceremony with their names being inscribed in the proper book (c. 788, §1); fourth, they must have been adequately instructed in the truths of the faith and the duties of a Christian (c. 865, §1); fifth, they must have been tested in the Christian life over the course of the catechumenate (c. 865, §1); and sixth, they must be urged to have sorrow for personal sins (c. 865, §1).

The Constitution on the Sacred Liturgy, *Sacrosanctum concilium* (1963), laid down the general directives for the catechumenate: "The catechumenate for adults, comprising several distinct steps, is to be restored and brought into use at the discretion of the local ordinary. By this means the time of the catechumenate, which is intended as a period of suitable instruction, may be sanctified by sacred rites to be celebrated at successive intervals of time" (*SC* 64).[62] The Constitution goes on to state: "In mission countries, in addition to what is furnished by the Christian tradition, those elements of initiation

[60] YARNOLD, "Catechumenate," p. 249.
[61] MACHADO, *The Catechumenate and its Canonical Implications*, p. 2.
[62] FLANNERY1, p. 21.

rites may be admitted which are already in use among some peoples in so far as they can be adapted to the Christian ritual […]" (*SC* 65).[63] These directives may also be applicable in evangelizing polygamous societies.

In 1965 the Council set out more detailed pastoral guidelines in the Decree on the Church's Missionary Activity *Ad gentes divinitus*. The decree stated clearly that the catechumenate is a period not only for instruction but also for gradual spiritual development and introduction to the life of the local community (*AG* 13).

> Those who have received from God the gift of faith in Christ, through the Church [*LG* 17], should be admitted with liturgical rites to the catechumenate which is not a mere exposition of dogmatic truths and norms of morality, but a period of formation in the whole Christian life, an apprenticeship of sufficient duration, during which the disciples will be joined to Christ their teacher. The catechumens should be properly initiated into the mystery of salvation and the practice of the evangelical virtues, and they should be introduced into the life of faith, liturgy and charity of the People of God by successive sacred rites [*SC* 64-65] (*AG* 14).[64]

The catechumenal process calls for the cooperation not only of clergy and catechists but also the godparents (*patrini*) and the whole community (cf. *AG* 6).[65]

The candidate's faith and conversion develop by a process which is both intellectual and spiritual. Blessings, exorcisms and other rites are celebrated not merely to mark and encourage progress but also as instruments of formation. In this way the catechumens are already connected to the Church, though not yet completely incorporated into it. Indeed, the Church grants certain prerogatives to catechumens that are proper to Christians (c. 206, §2). They are admitted to the blessings of the faithful and permitted, should they die, a Christian burial. They may celebrate their marriage in the Catholic Church, even to another non-Christian (RCIA, no. 18).[66] Nonetheless, they are normally dismissed from the Eucharistic assembly after they have been prayed for in the general intercessions.

[63] Ibid.

[64] Ibid., p. 828.

[65] See YARNOLD, "Catechumenate," p. 253.

[66] A distinct rite is used, the Rite of Celebrating Marriage between a Catholic Party and a Catechumen or a non-Christian, which is chapter IV of the *Ordo celebrandi Matrimonium*, editio typica altera, 1991. Despite its title, the rite may be used even when a catechumen is not marrying a Catholic party. See J.M. HUELS, "The Significance of the 1991 *Ordo celebrandi Matrimonium* for the Canon Law of Marriage," in *Studia canonica*, 43 (2009), p. 114.

According to W.G. Blum, polygamists who are to be received as catechumens need special attention and care. They should not be received with the other catechumens who are engaged in a proximate preparation for the reception of baptism, but their catechumenate should take on a special form because it is only a remote preparation for baptism.[67]

The purpose of the catechumenate for the polygamists is to help them live their Christian life to the fullest in the state in which they find themselves. Their status as catechumens is not looked upon as necessarily either permanent or temporary. Rather, through instruction they are brought to understand that God in his providence has permitted them to contract obligations which they cannot abandon in order to receive baptism. They should be encouraged to fulfill these obligations and to trust that God will grant them the opportunity for full incorporation into the Christian community, if and when this is in keeping with the divine plan. Instead of directing the concern to the future, the emphasis of the catechesis should be directed to what they can now do in their present circumstances.[68]

The second major step of the catechumenate is characterized by the election of candidates for sacramental initiation and the enrolment of their names. This ideally takes place in a liturgical rite celebrated by the bishop or his delegate at the beginning of Lent (RCIA, no. 133).

> The second stage of initiation begins the period of purification and enlightenment or illumination, marked by a more intense preparation of heart and spirit. At this stage the Church makes the 'election,' that is, the choice and admission of the catechumens who because of their dispositions are worthy to take part in the next celebration of the sacraments of initiation. This stage is called election because the admission made by the Church is founded in the election by God, in whose name the Church acts. It is also called the enrolment or inscription of names because the candidates, as a pledge of fidelity, write their names in the book of the elect.[69]

[67] W.G. BLUM, *The Unity of Christian Marriage Considered in Relation to the Polygamous Cultures of Uganda*, Kisubi, Uganda, Marianum Press, 1972, p. 61. There is some historical precedent for establishing an extended catechumenate as well as for excluding certain persons from baptism. From its earliest times the Church was not concerned about baptizing converts quickly. Indeed, a catechumenate lasting several years was very common and considered necessary. See TH. MAERTENS, *Histoire et pastorale du rituel du catéchumenat et du baptême,* Bruges, Publications de Saint-André, 1962, pp. 87-88.

[68] See BLUM, *The Unity of Christian Marriage Considered in Relation to the Polygamous Cultures of Uganda*, p. 62.

[69] RCIA, no. 22. According to RCIA, no. 24, the catechumenate ends with the celebration of the rite of election, thus completing the lengthy formation of the mind and heart. The one elected is encouraged to advance toward Christ with greater generosity. "From the day of their election and admission, catechumens are called 'elect.' They are also called *competentes*,

On the basis of the recommendation of the godparents and catechists, the local community vouches for the candidates' readiness for baptism, and their names are recorded in a book.[70] The election is a matter of great concern for the growth of catechumens; therefore it must be noted carefully by the whole community and the entire Church (RCIA, no. 135). Before the election and enrolment, the candidates are expected to have experienced a conversion of mind and morals, to have gained a sufficient knowledge of Christian teaching, and to have developed a clear sense of faith and charity. A consideration of their worthiness is required (RCIA, no. 23), including their marital status. A catechumen who is a polygamist must have his marital status regularized before he is admitted to the rite of election. Polygamists can be accepted into the Christian community as catechumens, but this acceptance is not without limitations. Those polygamists whose marital situation has not been regularized can be accepted only in the first stage of the catechumenate, excluding election, enrolment, and sacramental initiation (RCIA, nn. 133-142).

If the marital situation is regularized, the next step in the journey of sacramental initiation is the celebration of the rite of election. This rite marks the beginning of the period of final, more intense preparation for the sacraments of initiation during which the elect will be encouraged to follow Christ with greater generosity. For a person to be enrolled among the elect, he or she must have enlightened faith and the deliberate intention of receiving the sacraments of the Church. The election of catechumens is a matter of great concern to the Church, and the decision to admit them to the rite should be weighed carefully (RCIA, nn. 133-136).

> As a means to avoid an error in judgment, it would be wise to hold a deliberation on the suitability of the candidates before the liturgical rite is celebrated. This is done by those involved in training the catechumens—presbyters, deacons and catechists—and by the godparents and delegates of the local community. If circumstances permit, the assembly of catechumens may also take part. This deliberation may take various forms, depending on local conditions and pastoral needs. This acceptance should be noted by the celebrant during the liturgical rite.[71]

mature catechumens who strive together or contend to receive the sacraments of Christ and the gift of the Holy Spirit. They are also called the enlightened or illumined, because baptism itself is called enlightenment or illumination and by baptism neophytes are illumined in the light of faith. In our day, other terms may be used which are better adapted to common understanding according to the nature of the languages and civil cultures of various regions."

70 Cf. RCIA, nn. 22, 133.

71 Ibid., no. 137, pp. 62-63.

Catechumens who have not regularized their marital situation may retain their status as a catechumen for as long as they live. Moreover, when they are in danger of death, they can be admitted to sacramental initiation after fulfilling the minimal canonical requirements. Concerning the rite of adult initiation in proximate danger of death or at the point of death,[72] the RCIA states that:

> If he has already been accepted as a catechumen, he must promise that when he recovers, he will complete the usual training. If he is not a catechumen, he must show serious signs of conversion to Christ and of renunciation of pagan worship and should not seem to be bound by any obstacles to a moral life, such as "simultaneous" polygamy. Furthermore, he should promise that when his health is restored, he will follow the whole course of initiation suitable to him (RCIA, no. 279).

A polygamist who is in danger of death and who has already been accepted as a catechumen can be admitted to the sacraments of initiation provided he has knowledge of the principal truths of the faith, manifests the intention to receive baptism, and promises to observe the requirements of the Christian religion (c. 865, §2).

3.5 — Ongoing Christian Formation

The ongoing formation of converts is necessary for strengthening and deepening their faith and assisting them in leading a good Christian life.[73] Converts to the faith who were formerly polygamists may themselves play an effective role in the evangelization of polygamous families, which is another reason for their continuing faith formation. This ongoing formation should consist of two, mutually complementary dimensions: on the family level and the community level. It should include religious instruction and

[72] Various expressions are used in the canonical tradition to signify danger of death: *articulus mortis*, *periculum mortis* and *urgente mortis periculo*. *Articulus mortis* suggests that death that is certain and imminent, that is, the state of infirmity in which many ordinarily die. *Periculum mortis* suggests that death that is near and probable, that is, the state of infirmity in which it is probably and prudently feared that a person will soon die. The terminology *urgente mortis periculo* is explained by some authorities as something akin to *articulus* or certainly something more than merely *periculum mortis*. According to Dowdall, most writers before the 1917 Code taught that the distinction between *articulus* and *periculum mortis*, though sound theoretically, had little or no practical value and should not be enforced or insisted upon when the administration of the sacraments was concerned. See R.M. DOWDALL, *The Celebration of Matrimony in Danger of Death*, Vatican City, Polyglot Press, 1944, pp. 3-12.

[73] See RCIA, nn. 37-40; cc. 773-780.

programs on family life, youth, and marriage. Also desirable are seminars on inner healing and reconciliation as well as opportunities for counseling.

To promote better marriages, there is a need for continued follow-up of married couples. This can be done through clubs and associations, marriage encounter and other associations, family movements, basic ecclesial communities, seminars, retreats, marriage renewal courses, jubilee celebrations and natural family planning. Where feasible, a "permanent mobile team" composed of a priest, sister, catechist and other committed and outstanding Catholic Christian(s), chosen by the diocesan pastoral council, can be formed for coordinating ministry to and the ongoing formation of converts (and those yet to be baptized as well). The diocesan bishops should encourage these efforts through pastoral letters and instructions (cc. 34, 394). An effective pastoral centre in each diocese would also go a long way in meeting these crucial needs.

4 — *Communicating the Good News*

People in polygamous societies frequently live in circumstances of stress and even crisis due to the negative effects of polygamy. They may also live in great hope, especially those who want to embrace Christianity. Pastoral ministers must work so that these people may enter through church doors with a desire to encounter the Good News, already carrying in them the seeds of the Reign of God.[74] This requires that, even before formal admission to the catechumenate, they be offered appropriate pastoral care.[75]

Pastoral ministers should reach out to people in polygamous societies and aid them to search for and encounter meaning in life. They need to be offered a different pathway to deal with and respond to the deepest longings

[74] Cf. J.J. WALSH, *Integral Justice: Changing People Changing Structures*, Maryknoll, NY, Orbis Books, 1990, p. 108.

[75] "Pastoral care is a communal concept. It exists whenever persons minister to one another in the name of God. It is not a new concept but has its theological roots in the Judeo-Christian tradition. Any ministry of the Church that has as its end the tender, solicitous care of persons in crisis is pastoral care. In this light pastoral care exists when the hungry are fed, when the naked are clothed, when the sick are healed, when the prisoners are visited [when polygamous societies are evangelized]. Therefore, pastoral care has always existed in the Church because the needs of persons are ministered to by others all the time. Roles and functions as worship, church administration, preaching and teaching are not generally considered pastoral care, they become resources for pastoral care when their dominant concern is for the care of individual persons and their families in crisis situation." E.P. WIMBERLY, *Pastoral Care in the Black Church*, Nashville, Abingdon, 1979, p. 18.

of human hearts—to love, to be loved, to share, and to blossom. It is important for pastoral ministers to learn to know and understand these people, their specific culture, and their religious aspirations. Pastoral ministers can help polygamists express and satisfy their deepest longings by encountering God and other people through love. As faith deepens and takes on not only a personal but also a world dimension, polygamous societies will change. These developing peoples will be empowered to change their polygamous way of life through a new paradigm informed by Christianity.[76] Canon law, both universal and particular, offers structures to attain this ultimate goal, all of which involve various forms of communication. Among these are structures that promote united pastoral action, especially the diocesan pastoral council, the presbyteral council, assemblies of priests at the diocesan or deanery levels, small Christian communities, the media of social communication, and various forms of dialogue. Effective use of such means of communication and interaction is vital for the progress of the Church's mission of evangelization.

4.1 — Canonical Structures Fostering United Pastoral Action

To deal with any problem successfully, be it social, economic, political, anthropological, canonical or pastoral, there is needed a united approach that respects and builds on solid mutual relationships. Where there is unity, there is strength; where unity is lacking, weakness and division prevail. Some dioceses in sub-Saharan Africa lack unity and good mutual relationships among the bishop, priests and people within the diocese. This is the result of many factors, including tribalism, jealousy, favouritism, individualism, laziness, argumentativeness, lack of accountability, and poor leadership.

Since polygamy is a challenging pastoral problem in sub-Saharan Africa, it needs to be addressed carefully by all agents of the Church, clerical and lay, acting in collaboration and harmony. The bishop, clergy, religious, catechists and other faithful involved in evangelization must be united in their approach and work together. Such mutuality and cooperation are easily understood values in sub-Sahara African cultures due to the peoples' strong attachment to and experience of family, both nuclear and extended, but experience shows that this understanding does not always translate into effective pastoral action, particularly at the diocesan level where pastoral planning and good co-ordination are most necessary.

[76] Cf. ibid., p. 109.

The bonds of relationships in the diocese are multiple, involving bishop, *presbyterium*, deacons, religious and lay faithful. "The fact that there are in the Church pastors, lay people or religious, does not imply inequality in the dignity common to all the members (*LG* 32); it rather expresses the articulation of joints and functions in a living organism."[77] If all these groups of the faithful communicate and cooperate well, there will be unity, peace and harmony within the diocese, and problems can be faced in solidarity. As the African proverb goes: "one finger does not kill a louse." Communal responsibility is needed to approach the problem of polygamy.

4.1.1 — *Diocesan Pastoral Council*

A potentially effective, even if often underutilized, canonical structure for pastoral planning and co-ordination is the diocesan pastoral council. "In each diocese, insofar as pastoral circumstances suggest, a pastoral council is to be established. Its function, under the authority of the Bishop, is to study and weigh those matters which concern the pastoral works in the diocese, and to promote practical conclusions concerning them" (c. 511).[78] Since a diocesan pastoral council is composed of members of Christ's faithful who are in full communion with the Church (c. 512, §1), this in itself is a real reflection and an authentic sign of unity in the diocese. The pastoral council ideally serves as a "structured means for dialogue […] to investigate pastoral needs, to discern options to address those needs, and to make a specific recommendation of one of those options."[79] It can serve well as the meeting

[77] SACRED CONGREGATION FOR RELIGIOUS AND SECULAR INSTITUTES and SACRED CONGREGATION FOR BISHOPS, Directives for Mutual Relations between Bishops and Religious in the Church *Mutuae relationes*, 23 April 1978, in *AAS*, 70 (1978), pp. 473-506; FLANNERY2, p. 211.

[78] *CD* 27 states: "It is highly desirable that in every diocese a special pastoral council be established, presided over by the diocesan bishop himself, in which clergy, religious and laity specially chosen for the purpose will participate. It will be the function of this council to investigate and consider matters relating to pastoral activity and to formulate practical conclusions concerning them."
The pastoral council can help the bishop to formulate practical conclusions concerning evangelization of polygamous families. The decree on the Church's missionary activities, *Ad gentes divinitus*, no. 30 states: "For better coordination, the bishop should, as far as possible, establish a pastoral council in which clergy, religious and lay people would have a part through elected delegates. He should also take care that apostolic action is not entirely restricted to those who have already been converted, but that a fair proportion of workers and funds is directed to the evangelization of a non-Christians."

[79] J.A. RENKEN, "Pastoral Councils: Pastoral Planning and Dialogue among the People of God," in *The Jurist*, 53 (1993), p. 132.

point for representatives of all the members of the diocese in union with the bishop.[80] The pastoral council, with broad representation from a variety of areas, social groups, and apostolates, can bring the faithful together in a forum for regular dialogue to investigate and weigh matters that bear on pastoral activities and to formulate practical conclusions regarding them. In this setting, the problem of polygamy can be addressed in solidarity with the broader community and, hopefully, better pastoral strategies will be the outcome. The pastoral council can give recommendations on how to meet pastoral needs in polygamous societies. These recommendations will ordinarily indicate a means of implementation involving perhaps some other agent and, at the same time, the council can continue to do planning for the community.[81]

4.1.2 — *Priests' Meetings*

Unity and mutual cooperation among the clergy themselves and in conjunction with the bishop are very important for providing pastoral care to polygamous families. Any division between bishop and priest in a diocese is like a crack in a house with the consequences being that the pastoral work in the diocese will waver and deteriorate. This can be avoided by bringing priests together for regular meetings at both the diocesan and deanery levels.

It is a canonical obligation of all clerics to promote unity and cooperation among themselves (c. 275; *CCEO* cc. 379; 381, §3). Moreover, according to c. 369 (*CCEO* c. 177, §1), the bishop governs the diocese with the cooperation of the *presbyterium*. Consequently, there must exist a unity and mutual cooperation between the bishop and priests. There is a hierarchical communion in the diocese between the bishop and the priests by virtue of which they participate in different degrees but in an identical priesthood and ministry, thus forming a single *presbyterium* (*LG* 28; *CD* 28).

The key canonical structure for promoting the unity and cooperation of priests in the diocese is the presbyteral council. Canon 495, §1 states:

> In each diocese is to be established a council of priests, that is, a group of priests who represent the *presbyterium* and who are to be, as it were, the Bishop's senate. The council's role is to assist the Bishop, in accordance with the law, in the governance of the diocese, so that the pastoral welfare

[80] Cf. R. PAGÉ, *The Diocesan Pastoral Council*, translated by B.A. Prince, Paramus, NJ, Newman Press, 1970, p. 58.

[81] Cf. RENKEN, "Pastoral Councils," p. 147.

> of that portion of the people of God entrusted to the Bishop may be most effectively promoted.[82]

In order to consolidate or strengthen this unity of mission, the members of the presbyteral council, who represent the body of priests, both secular and religious, advise and assist the bishop in the management of the diocese (*PO* 7).

The unity and cooperation between the bishop and priests can be enhanced through this council as well as other meetings of priests, including regular assemblies of all the priests of the diocese. All-priests' meetings or all-diocesan clergy meetings are a practical means of establishing and maintaining unity and mutual relations between priests and the bishop in order to foster the apostolate in a diocese and address common problems, including potential approaches to the problems arising from polygamy.

Canon 374, §2 recommends the grouping of parishes into several infra-diocesan structures such as vicariates forane, also called deaneries.[83] The main function of these vicariates forane or deaneries is to foster pastoral care. Deanery meetings where programs, policies, and principles are shared and discussed by the priests of that particular place who are engaged in the pastoral work may be an effective means for maintaining unity and support as well as for sharing the richness of diverse perspectives and experiences. The deanery meeting can also foster solidarity in pastoral action towards polygamists.

The unity and mutual relationship among priests and bishop in each diocese requires the existence and regular use of Church organs such as the presbyteral council and deanery meeting. Without them, the unity among the priests and bishop could be weak, and it would be difficult to deal with problems or develop pastoral policies for the diocese.

4.2 — Small Christian Communities

The 1974 Synod of Bishops and Pope Paul VI in *Evangelii nuntiandi* devoted considerable attention to basic communities (*EN* 58). These are groups of Christian families in the same neighbourhood whose purpose is

[82] The Latin text reads as follows: "In unaquaque diœcesi constituatur consilium presbyterale, cœtus scilicet sacerdotum, qui tamquam senatus sit Episcopi, presbyterium repræsentans, cuius est Episcopum in regimine diœcesis ad normam iuris adiuvare, ut bonum pastorale portionis populi Dei ipsi commissæ quam maxime provehatur (c. 495, §1).

[83] The Latin text of c. 374 reads: §1. Quælibet diœcesis aliave Ecclesia particularis dividatur in distinctas partes seu parœcias. §2. Ad curam pastoralem per comunem actionem fovendam plures parœciæ viciniores coniungi possunt in peculiares cœtus, uti sunt vicariatus foranei.

their own evangelization and growth in the Christian life.[84] Several episcopal conferences, including the bishops of East and Central Africa, adopted the building of small Christian communities as a key priority of their pastoral plan for communicating the message of salvation.[85]

> The small (or basic) Christian community brings together several families in a given neighbourhood. It is a cell of committed Christians at the service of the Church and in dialogue with the world. It is concerned first and foremost with how to be Christian in a given life-context and with how to penetrate the local culture and bring the values of the gospel to bear upon it. […] It enjoys a measure of structural freedom, while at the same time acting as an agent of pastoral care in the parish. In the small Christian community collaborative ministry can be realized in a manner that is not yet possible at other levels of the Church, and which is effective for evangelization. Such witness can prepare a mentality which is more favourable towards giving women a place in Church leadership.[86]

In order to deal with the problem of polygamy at the grassroots level, the establishment and formation of the small Christian community is optimal, for it has the potential to influence the wider society. Since community is important both to the sub-Sahara African cultures and to Christianity, formation of small Christian communities must be considered a primary focus of any pastoral plan.

A. Mringi describes small Christian communities as a gathering of eight to twelve families, depending on local conditions and on the natural community on which it must be built. The number should be small enough so

[84] SHORTER, *Evangelization and Culture*, p. 59.

[85] SYNOD OF BISHOPS: SPECIAL ASSEMBLY FOR AFRICA, *The Church in Africa and Her Evangelizing Mission towards the Year 2000*, p. 39. See SHORTER, *Evangelization and Culture*, p. 59.
Small Christian communities are also known as basic Christian communities or basic ecclesial communities. These communities appear in various forms from country to country but in general they bring together several families from an area within a parish or territory to form an organized local group of the faithful gathered in the name of the Lord (cf. Mt 18:20). They are a means of developing a more participative Church in which people find their rightful place. As domestic church (*LG*, no. 11), they are true expressions of ecclesial communion for sub-Saharan Africa because they fit the culture, family and clan structure. They foster "a sense of belonging" and being united for a common purpose in the Church. They are also primarily tangible and local realities (SHORTER, *Evangelization and Culture*, p. 58). Therefore, small Christian communities can be strong instruments of evangelization of polygamous families and a sure way of imparting the teachings of the Church. They are efficient means of spreading the Gospel and inculcating the values of justice and peace. These issues can be dealt with at the grassroots level in the daily life of the small Christian communities.

[86] SHORTER, "Inculturation: Win or Lose the Future," p. 64.

that it is possible for the members to know each other and to minister easily to one another. This gathering should include prayer, sharing, and mutual support whereby everyone learns from and evangelizes each other. A Christian community lives and experiences Christ on a daily basis and together participates in ecclesial services and ministries.[87] Members recognize that their neighbourhood community is under the lordship of the Saviour Jesus Christ and under the guidance of the Holy Spirit who helps them to persevere in prayer, share the word of God and engage in concrete local issues, which may include providing for the basic needs of its members with regards to health, economy, education and recreation.

Small communities can play a significant role in the evangelization of polygamous societies. This may be done through commitment to outreach, by physical and spiritual support, regular visits whether at times of joy or sorrow, and developing friendly relations with the polygamists. These communities together can reflect on their lives by sharing the Word of God and by nurturing the community in faith. With this model of life, polygamous families can be attracted to and be invited to join the small Christian communities. They therefore can experience real interpersonal relationships at the grassroots level and feel a sense of communal belonging, both in living and in working. It is here, within these communal cells, that the faithful live the faith in every aspect of life and thus have the potential to spread it to others through words and good example.[88]

To deal with the problem of polygamy from the grassroots, dioceses in sub-Saharan Africa should draw on the resources of the small Christian communities where they exist and establish them where they do not. This should be a key pastoral priority.[89] Small Christian communities can carry

[87] A. MRINGI, *Small Christian Communities in Eastern Africa with Particular Reference to Tanzania: Canonical Implications*, Canon Law Studies, 514, Washington, DC, Catholic University of America, 1985, Ann Arbor, Michigan, UMI, 1988, pp. 110-111.

[88] These communities can also help eliminate individualism and egoism, both of which are contrary to Christian faith and praxis. See ibid., p. 109.

[89] According to SHORTER, *Evangelization and Culture*, pp. 59-60: [Small Christian communities] provide an immediate life context within which Christians can practice their faith and carry out their vocation to evangelize. They are a new way of being Church and of building the Kingdom of God within the neighbourhood. Although Christians join them freely and they reflect given human environments—geographical, socio-economic, interpersonal—small Christian communities help to restructure the parish and to provide a resource for its pastoral team. […] Small or basic communities exist for the parish and for helping to carry out its evangelizing role.

[…] They meet to pray, to study Scripture and to apply it to daily life. They carry out pastoral visits to the sick and needy. They help to organize spiritual retreats and doctrine courses. They intervene to correct abuses of social justice. They offer support to married

out the task of evangelization among polygamous societies by respecting, welcoming, encouraging and caring for their unbaptized neighbours, in effect, acting as true disciples of Christ in the service of the Church and of the world.[90]

4.3 — Social Communication Systems

The Second Vatican Council, in the Decree on the mass media *Inter mirifica*, states:

> The Catholic Church was founded by Christ our Lord to bring salvation to all men. It feels obliged, therefore, to preach the gospel. In the same way, it believes that its task involves employing the means of social communication to announce the good news of salvation and to teach men how to use them properly. It is the Church's birthright to use and own any of these media which are necessary or useful for the formation of Christians and for pastoral activity. Pastors of souls have the task of instructing and directing the faithful how to use these media in a way that will ensure their own salvation and perfection and that of all mankind.[91]

Most polygamous families live in areas where there are few or no mass communication systems and, as a consequence, they miss important information and guidance that could help influence them to change their traditional ways of thinking which go against canonical norms and the Church's teaching. Because of the lack of means of communication and contact with other families of different cultures, some polygamous families live in their own world and think that polygamy is the only way of life. The world for them is a "closed shop" which they believe is made by God with certain rules, regulations, and laws that cannot change, and they think the best way to make one's way in this world is to continue to follow the customs, ways, and laws of their forefathers. Anything outside traditional boundaries is strange and threatening. Contact between them and members of other societies who do not observe the same customs is minimal and occurs usually only when necessary for business. Their cultural identity is very strong, which could be interpreted either as a healthy pride in and acceptance of themselves or as a sort of dogmatism, an exclusivity born of a culture that

couples and families. They teach catechism and help to prepare members to receive the sacraments and to celebrate the Sunday liturgy. They contribute to the liturgical and spiritual life of the parish as a whole. They undertake development and co-operative projects. In all these ways small Christian communities carry out the task of evangelization through proclamation, praxis and prayer.

90 Cf. ibid., p. 144.

91 *IM* 3; FLANNERY1, pp. 284-285.

feels its existence threatened by outside forces. The Church cannot evangelize them unless it establishes and maintains good contact with them. To reach these people effectively, the establishment or improvement of communication systems is vital. The legislator's recognition of the importance of the media is seen in the establishment of a distinct discastery of the Roman Curia entrusted with this area.[92] The Code, too, reflects this concern in c. 822 (*CCEO* c. 651) and in the subsequent canons on instruments of social communication.

> §1. In exercising their office the pastors of the Church, availing themselves of a right which belongs to the Church, are to make an ample use of the means of social communication.
>
> §2. Pastors are also to teach the faithful that they have duty of working together so that the use of means of social communication may be imbued with a human and Christian spirit.
>
> §3. All Christ's faithful, especially those who in any way take part in the management or use of the media, are to be diligent in assisting pastoral actions, so that the Church can more effectively exercise its office through these means.[93]

The modern media include the press, cinema, radio, television, Internet, newspapers, pamphlets and periodicals. According to Vatican II, they can rightly be called "the means of social communication," which "can reach and influence not merely single individuals but the very masses and even the whole of human society" (*IM* 1). The communication systems can play a key role in evangelizing polygamous families primarily by taking them out of their closed world and bringing them into the global community. This can raise their awareness and enable them to discern positive and negative elements in their culture. The use of the media can help people in polygamous

[92] The Pontifical Council for Social Communications "takes pains to see that newspapers and periodicals, as well as films and radio or television broadcasts, are more and more imbued with a human and Christian spirit" (*PB* art. 170, §1). "With special solicitude the Council looks to Catholic newspapers and periodicals, as well as radio and television stations, that they may truly live up to their nature and function, by transmitting especially the teaching of the Church as it is laid out by the Church's magisterium, and by spreading religious news accurately and faithfully." Ibid., §2.

[93] The Latin texts of c. 822 reads as follows:
§1. Ecclesiæ pastores, in suo munere explendo iure Ecclesiæ proprio utentes, instrumenta communicationis socialis adhibere satagant.
§2. Iisdem pastoribus curæ sit fideles edocere se officio teneri cooperandi ut instrumentorum communicationis socialis usus humano christianoque spiritu vivificetur.
§3. Omnes christifideles, ii præsertim qui quoquo modo in eorundem instrumentorum ordinatione aut usu partem habent, solliciti sint operam adiutricem actioni pastorali præstare, ita ut Ecclesia etiam his instrumentis munus suum efficaciter exerceat.

families, especially women and girls, to recognize that they have rights. Moreover, it can inform men in this society to respect the rights and dignity of women. The Church's use of the various means of communications in an open, honest, and positive way can create good public relations, which facilitates the work of evangelization in polygamous societies, promotes critical self-awareness, helps the people to recognize their rights and gives them insight so that they can discern the good and evil influences of their culture.

Apart from the use of the modern media of communication, the use of traditional ways of communication is also important toward the evangelization of polygamous families because "traditional means draw their inspiration from a certain worldview and are understood by a whole people: the story, drama, proverb, debate, dance, mime, theatre, music, feasting, etc."[94] These traditional means of communication are often lively and spontaneous and may be very effective in the task of evangelization. "It ought to be recognized that the Church usually gives a special place to traditional means in her pastoral work, especially in making use of song, dance, the drum, proverbs and mime. These means are plentifully employed in preaching (the bedrock of communication in the Church) and on the occasion of liturgical celebrations."[95]

4.4 — Dialogue

Dialogue is communication that is bilateral or multilateral. People are not just talked at but talk together. Sub-Sahara African societies love constructive dialogue because, involving all parties, it results in a strong consensus. The Church needs to take account of this fact in its work of evangelization, both by efforts to dialogue directly with the people, including polygamous families, the elders of the community, as well as members of other Christian denominations and faiths.[96]

Canon law recognizes the importance of dialogue in the evangelization of non-believers (c. 787, §1).[97] It is indispensable in the evangelization of polygamous families who cannot be expected to accept the demands of the Gospel without giving voice to their own cultural values. A true evangelization is achieved by respecting and listening to one another, which is what

[94] Synod of Bishops: Special Assembly for Africa, *The Church in Africa and Her Evangelizing Mission towards the Year 2000*, p. 106.

[95] Ibid.

[96] Dialogue is an important characteristic of the world we live in. See ibid., p. 57.

[97] Cf. *PB*, arts. 163-165.

sincere dialogue seeks. Through sincere dialogue suited to the abilities, culture and background of the polygamous families, the Gospel message may be freely embraced (cf. c. 748, §2).

People are naturally attracted to those who listen with genuine interest to their problems. This is a happy experience that produces trust. Listening to people and showing interest in them wins their hearts and gives them the freedom to express themselves and identify their potential problems. The dialogic process can prevent conflict and discord and bring about mutual understanding. It is necessary that the dialogue continue also when the persons involved in a polygamous marriage wish to be baptized. In particular, it is necessary to reach an agreement between a polygamist and his wives so that the conversion will not be a cause of suffering for them or their children.

In dialogues with sub-Saharan peoples, special attention must be paid to the elders who are the traditional leaders of their families and communities. Family and clan elders/leaders play a great role in these societies. Frequently, they are the ones who make decisions in the clan, and often they are the traditional lawmakers. They are respected by all members of the clan, and their decision on any issue is often final even if it is a wrong decision or it runs contrary to the Church's teaching and canonical norms. For example, some believe God inspires them to be polygamists because marrying several wives will give them many children to fill their household, help in various activities in their families, and perpetuate their ancestry.

Male elders are regarded as the principal authority figures in these societies. A woman or young person who would presume to teach in their place would be looked down upon and humiliated. The Church's ministers must therefore pay special attention to the elders and leaders because of their influence and authority. The best way to achieve this is to immerse oneself in their culture and listen to them as they interact and solve problems. Through other social activities such as working with them, eating, drinking, and dancing, one has the opportunity to observe the spirit of dialogue which marks the relationships among the people. Prayer, respect, charity, patience and collaboration are also necessary means of approaching the elders.

With the introduction of something new and threatening such as the monogamous union proposed by the Church, one is confronted with the biggest obstacle which polygamists, especially elders, fear most, for they have the most to lose. Hence, unless the elders are convinced of the value of Christianity, any evangelization effort, even if partially successful among the women, youth and children, will prove futile in the long run. The Christian formation of these leaders may seem a monumental task,

but it will have the best chance of success if carried out in an atmosphere of friendly dialogue.

The word "dialogue" has a special meaning in religious circles where it often indicates formal or informal discussions between Christians of different denominations or between members of different faiths.[98] Bernard Häring noted that "the problem of polygamy is confronted by the African Churches as a whole and not only by Catholics."[99] Since the Catholic faithful in much of sub-Saharan Africa do not live in isolation from other Christians, there is a great need of collaboration with these other Christian denominations in pastoral outreach to and evangelization of polygamous families. Due to indifference on the part of some Christians with regard to this problem of polygamy, however, such dialogue may be difficult, but it is a necessary aspect of the Church's divine mandate: *ut unum sint*.[100]

One of the canonical obligations of the diocesan bishop is fostering ecumenism as it is understood by the Church (cc. 383, §3; 755, §2). Ecumenical cooperation within local churches may lead to common pastoral strategies that can facilitate outreach to polygamous families, especially those who are seeking entrance into the Church.[101] If the Christian churches and

[98] The Second Vatican Council exhorted all the Catholic faithful to recognize the signs of the times and to take an active and intelligent part in the work of ecumenism. "The restoration of unity among all Christians is one of the principal concerns of the Second Vatican Council. Christ the Lord founded one Church and one Church only. However, many Christian communions present themselves to men [people] as the true inheritors of Jesus Christ; all indeed profess to be followers of the Lord but they differ in mind and go their different ways, as if Christ himself were divided [1 Cor. 1:13]. Certainly, such division openly contradicts the will of Christ, scandalizes the world, and damages that most holy cause, the preaching of the Gospel to every creature" (*UR* 1). FLANNERY1, p. 452.

[99] HÄRING, *Evangelization Today*, p. 146.

[100] In John's Gospel, Jesus prays: "That all may be one, as you, Father, are in me, and I in you; I pray that they may be one in us, that the world may believe that you sent me" (Jn 17:21). See JOHN PAUL II, Encyclical Letter *Ut unum sint*, no. 9, 25 May 1995, in *AAS*, 87 (1995), pp. 921-982; trans. *Christian Unity: Encyclical Letter Ut unum sint, 25 May 1995 of the Holy Father John Paul II on Commitment to Ecumenism*, Sherbrooke, Quebec, Médiaspaul, 1995, pp. 12-14.

[101] "[….] Cooperation among Christians vividly expresses that bond which already unites them, and it sets in clearer relief the features of Christ the Servant. Such cooperation, which has already begun in many countries, should be developed more and more, particularly in regions where social and technological evolution is taking place. It should contribute to a just appreciation of the dignity of the human person, to the promotion of the blessings of peace, the application of Gospel principles to social life, and the advancement of the arts and sciences in a truly Christian spirit. It should also use every possible means to relieve the afflictions of our times, such as famine and natural disasters, illiteracy and poverty, lack of housing, and the unequal distribution of wealth. Through such cooperation, all believers

ecclesial communities speak with one voice in their dialogue with the traditional rulers and cultural elite, there is the greater likelihood that their message will be heard, leading to the conversion of heart required before customs in opposition to Christian tradition and morals can be removed.[102] Lack of dialogue and cooperation among the Christian denominations, all comprised of baptized brothers and sisters, can only discredit their message, obfuscating that unity for which Christ prayed and diminishing their credibility in the eyes of the local leadership.

The Church in sub-Saharan Africa has to dialogue also with the African traditional religion because it represents the common cultural, religious and spiritual rooting for all who belong to the same ethnic group. In it are found elements which, if purified and elevated in the light of the Gospel, can become a firm foundation of religious and cultural heritage upon which an authentic Christian life can be built. Such "dialogue" cannot take place in any formal sense, for African traditional religion lacks the hierarchical or structural organization and developed theological tradition for such to occur. Rather, the dialogue will primarily be that of listening to the people, immersing oneself within their culture, attempting to understand their values and thereby little by little planting the seeds of the Christian faith on fertile soil.[103]

5 — *Diocesan Pastoral Plan*

A diocesan pastoral plan or program can be a very helpful means of coordinating the evangelization and catechesis of polygamous families.[104]

in Christ are able to learn easily how they can understand each other better and esteem each other more, and how the road to the unity of Christians may be made smooth" (*UR* 12; FLANNERY1, pp. 462-463).

[102] "There can be no ecumenism worthy of the name without interior conversion. For it is from newness of attitudes of minds [see Eph 4:23], from self-denial and unstinted love that desires of unity take their rise and develop in a mature way. […] The faithful should remember that they promote union among Christians better, that indeed they live it better, when they try to live holier lives according to the Gospel. For the closer their union with the Father, the Word, and the Spirit, the more deeply and easily will they be able to grow in mutual brotherly love" (*UR* 7).

[103] Cf. Mk 4:1-9; Mt 13:1-9; Lk 8:4-8.

[104] "Pastoral planning, under the guiding leadership of the Holy Spirit, is nothing new in the Church. From the very beginning of our history as God's people redeemed in Jesus our Lord, planning has been a common part of our life. In the Acts of the Apostles, for example, we see the need to care for the Greek widows (6: 1-6), the need to catechize the great

Polygamous families cannot change if there is no evangelization; evangelization cannot flourish if there is no basic foundation established by catechesis; and catechesis cannot be carried out throughout the diocese if there is no good pastoral program. In particular, the pastoral plan should develop strategies and structures to foster the apostolate of evangelization and catechetical instruction.

5.1 — The Apostolate of Evangelization

According to c. 781 (*CCEO* c. 584, §1), the Church is missionary in its nature. The work of evangelization is to be considered a fundamental duty of all the people of God (cf. *AG* 2 and 35).[105] The seed of faith sown by primary evangelization, born and nurtured, will gain its momentum and, step by step, conversion to Christianity will be achieved. This apostolate of evangelization needs personnel who are well trained and committed to proclaim the Good News by word and deed.

Evangelization personnel include catechists, members of lay apostolate groups, lay pastoral ministers,[106] marriage counselors, clergy and religious. In areas where there are not enough clergy and religious, catechists often take their place on the "front line" of evangelization. They conduct the liturgy of the Word and offer catechesis at all levels—to adults, teenagers, and

numbers in Antioch (11: 19-26), the need to relate Mosaic laws to Gentile converts (15: 1-35), and so forth. In each of these instances, and countless similar ones throughout history, church leaders discovered particular pastoral needs, discerned ways to address them, and then selected one of the possible options. This is 'pastoral planning'." RENKEN, "Pastoral Councils," p. 132.

[105] "Consonant with baptism, each of the faithful in accord with his or her own proper condition participates in the priestly, prophetic and kingly functions of Christ (c. 204). All of the Christian faithful enjoy a true equality and dignity and cooperate in building up the Body of Christ in accord with their condition and function (c. 208)." R. MCDERMOTT, "Woman, Canon Law on," in B.L. MARTHALER et al. (eds.), *New Catholic Encyclopedia*, vol. XIV, 2nd ed., Detroit, Thomson/Gale, 2003, p. 820.

[106] See A. ASSELIN, "The Laity and the Church's Office of Governance," (Class notes), Ottawa, Faculty of Canon Law, Saint Paul University, 2009, p. 71. Asselin explains that the term, "lay pastoral minister," which can also designate all forms of ministry exercised by lay people, includes persons who participate in the exercise of the pastoral care without a pastor under the supervision of a priest-moderator (c. 517, §2). According to her, the role of the lay pastoral minister has enormously evolved since the promulgation of the 1983 code. She gives as an example that, in Quebec, there is frequently a clustering of parishes with one pastor or a moderator of several communities and a lay person in charge of the pastoral care. Some rural parishes no longer have a resident priest, and sacramental celebrations and Sunday Eucharist can no longer be assured. This can be compared to the situation in sub-Saharan African, especially in rural areas where there is a shortage of priests.

children. They prepare children for the sacraments of penance, Holy Eucharist and confirmation. Given their central role in evangelization, they need to be trained to help direct and form a Christian perspective in the social milieu of polygamous families. Canon 780 emphasizes the formation of catechists: "Local Ordinaries are to ensure that catechists are duly trained to carry out their office properly, namely, that continuing formation is available to them, that they have an appropriate knowledge of the teaching of the Church, and that they learn both the theory and the practice of the principles of pedagogy."[107] The diocesan pastoral program thus needs to attend to the training of sufficient catechists to meet the needs of Christian formation throughout the diocese.

The diocesan pastoral plan should also include a role for all the faithful in the apostolate of evangelization. All baptized are called to play their part in the Church's mission. This entails a pastoral plan that includes the organization of families, parents, children, and youth for this mission. The laity should be encouraged to carry out the work of evangelization, not only within their families but also to the larger community, including polygamous families. This obligation of the faithful to undertake the apostolate, which proceeds from their baptism, is emphasized by c. 225, §1.

> Since lay people, like all Christ's faithful, are deputed to the apostolate by baptism and confirmation, they are bound by the general obligation and have the right, whether as individuals or in associations, to strive so that the divine message of salvation may be known and accepted by all people throughout the world. This obligation is all the more insistent in circumstances in which only through them are people able to hear the Gospel and to know Christ.[108]

Lay persons, by their witness of Christian life and fidelity to their baptismal obligations, have a great role in the evangelizing mission to polygamous families in sub-Saharan Africa. To motivate and encourage the laity to become involved in the apostolate of evangelization, every diocese should establish a centre for their formation with the necessary courses, workshops, and programs.

[107] For the formation of catechists for the missions, cf. c. 785.

[108] The importance of the involvement of lay persons in pastoral structures such as in parishes, dioceses, teaching institutions, hospitals or elsewhere cannot be overstated. All these institutions need personnel and people with different talents. This need cannot be taken into consideration without the involvement of lay people. Unfortunately, some priests fear collaborating with the lay faithful in the pastoral ministry. These priests must be helped to overcome their fear and mentality. Co-responsibility, active collaboration and good relationships among the people of God are essential elements in the mission of evangelization.

There is also a great need of fostering vocations to all ministries. The work of evangelization involves the whole family of God—lay people, clergy and religious. Goals cannot be achieved without basic and ongoing formation,[109] and this requires a concerted effort at both the parish and diocesan levels.

To promote and nurture vocations, the diocesan pastoral plan should provide for the organization of vocation groups from small Christian communities. These specific groups can conduct different youth activities, develop associations, and offer seminars, workshops or even a youth congress to educate with regards to different vocations. By means of these endeavors, youth can discover and use their talents and thus be encouraged and enabled to recognize their vocations. Parents, too, must be educated in their responsibility to foster vocations by showing good example, forming their children in chastity, protecting them from ideological and moral danger, bringing them into the ecclesial community and assisting them in recognizing and pursuing their vocations.

The vocational committees should encourage families to emphasize the role of family prayer and Bible reading in the fostering of vocations. These committees can assist teachers in incorporating the dimension of vocational awareness in religious education in schools and in colleges and in strengthening apostolic vocation groups in these settings. Indeed, this responsibility pertains to the whole local Church under the moderation of the bishop (cf. c. 385).

Spiritual cooperation between polygamous families and outstanding Christian families is another approach to evangelize polygamous families. The members of small Christian communities can arrange among themselves a plan whereby every outstanding and committed Christian couple within the community maintains a relationship with a selected polygamous family, the aim being to help that family grow and bring them to conversion.

[109] These lay people commit themselves to render services to the apostolate of the Church so the appropriate formation for them is canonically required (cf. c. 231).
"[…] It is a great joy to the Church to see growing day by day the number of lay people who are offering their personal services to associations and works of the apostolate, whether within the confines of their own country, or in the international field, or, above all, in the Catholic communities of the missions and of the young Churches.
"Pastors are to welcome these lay persons with joy and gratitude. They will see to it that their condition of life satisfies as perfectly as possible the requirements of justice, equity and charity, chiefly in the matter of resources necessary for the maintenance of themselves and their families. They too should be provided with the necessary training and with spiritual comfort and encouragement" (*AA* 22). For the ongoing formation of clergy, see c. 279 and, for religious, cc. 660 and 661.

Since some Christians condemn polygamists, this will also serve to educate them on how to take a positive approach to their evangelization.

Youth and children, too, have their own role to play in evangelization, which should be recognized and organized in the diocesan pastoral plan. The Church, as the family of God, depends very much on the stability and strength of children and young people in furthering evangelization. They are very important members in the community for the present and future Church in sub-Saharan Africa. Children, as Pope John Paul II said, "are a continual reminder that the missionary fruitfulness of the Church has its life-giving basis not in human means and merits but in the absolute gratuitous gift of God."[110] With regard to young people, the pope said: "Youth must not be simply considered as an object of pastoral concern for the Church. In fact young people are and ought to be encouraged to be active on behalf of the Church as leading characters in evangelization and participants in the renewal of society."[111]

Through good upbringing and education, children and youth will have the necessary basis for participating in evangelizing groups. If they are provided with a solid Christian upbringing, beginning in their own Christian families, they will be a good example and will attract children and youth from other polygamous families. Unfortunately, in much of the world where children and youth form the largest percentage of the people of God, the majority of them are underprivileged, oppressed and/or suffer various kinds of injustice. In many instances, the younger generation lives with parents who do not fulfill their parental duties.[112] Thus, the formation of children cannot be fully successful without accompanying it with necessary social assistance.

The formation of youth and children, moreover, is a communal responsibility. "One knee does not bring up a child," says an African proverb, or "one hand cannot nurse a child." This proverb equally applies to bringing up children in the faith. The Christian youth themselves can be effective evangelizers of their non-Christian companions.[113] This is because youth participate in activities in common, such as games, choir, study, visiting one another and conversing. Small children, as well, are naturally inclined to

[110] JOHN PAUL II, Post-synodal Apostolic Exhortation *Christfideles laici*, 30 December 1988, in *AAS*, 81 (1989), p. 484; English trans. in *Origins*, 18 (1988-1989), p. 584.

[111] Ibid., pp. 583-584.

[112] P.N. BOAMPONG, *A New Approach to the Youth Apostolate in Ghana*, Rome, Pontificia Universitas Lateranensis, 1980, pp. 25-26.

[113] These ministries can be coordinated with groups such as YCS (Young Catholic Students) and VIWAWA (Catholic Youth Group).

interact with each other. Youth and children from polygamous families can learn good morals from the youth and children of Christian families.[114]

5.2 — Catechetical Instruction

Catechetical instruction is an instrument of evangelization which must not be neglected in evangelizing polygamous families.[115] A systematic course of religious instruction should lead the minds of all, especially those of children and adolescents, to an understanding of the principal components of the living treasure of truth which God has communicated to us and which the Church in the course of her long history has always been zealous to enunciate ever more comprehensively.[116] The Church has always looked on catechesis as a sacred duty and an inalienable right. Therefore, it cannot be dissociated from the Church's pastoral and missionary activities as a whole.[117] The specific aim of catechesis is "to develop, with God's help, an as yet initial faith, and to advance in fullness and to nourish day by day the Christian life of the faithful, young and old. It is in fact a matter of giving growth, at the level of knowledge and in life, to the seed of faith sown by the Holy Spirit with the initial proclamation and effectively transmitted by baptism."[118]

Catechesis, that is, the education of children, young people and adults in the faith,[119] should be organized for polygamous families who are in any

[114] J.P. MBYEMEIRE, *A Theological Analysis of the Problem of Justice and Peace: The Contribution of the Special Synod for Africa and the Church in Uganda*, Rome, Pontificia Universitas Urbaniana, 1997, p. 10, recalls that the African Synod acknowledged that young people, while in need of education in school and in the Church, must find their primary educators in the family and local society. Young people have to be called into dialogue with the Church, and they have to be supported in their commitment to Jesus Christ and their grasp of the Gospel, for none of the concerns of evangelization—witness, inculturation, justice, peace and development—can be realized without the cooperation of the new generations. Undoubtedly, this concern calls for the invention of new models of development to meet the challenge of integrating the enormous potential of the young generations who have the potential of assimilating the Gospel of Christ, and the values of justice and peace.

[115] See cc. 773-780.

[116] PAUL VI, Apostolic Exhortation *Evangelii nuntiandi*, 8 December 1975, in *AAS*, 68 (1976), pp. 5-76; English trans. in FLANNERY2, p. 729.

[117] JOHN PAUL II, Apostolic Exhortation *Catechesi tradendae*, 16 October 1979, in *AAS*, 71 (1979), pp. 1277-1340; English trans. in FLANNERY2, pp. 769-772.

[118] Ibid., p. 774.

[119] Ibid., p. 772. Cf. SYNOD OF BISHOPS: SPECIAL ASSEMBLY FOR AFRICA, *The Church in Africa and Her Evangelizing Mission towards the Year 2000*, p. 86.

stage of the pre-catechumenate or catechumenate proper.[120] This can be achieved in part by drawing on the traditional value of working in groups to sustain solidarity among those who first hear the Good News and subsequently prepare intellectually and spiritually for sacramental initiation. The catechetical instructions should emphasize the meaning and importance of the sacraments in the Christian life, the concept of God and the obligations of parents. Those who have expressed the wish to embrace faith in Christ and to receive baptism are to be admitted to the catechumenate in accordance with the program of the diocesan pastoral council and other universal and particular laws (cc. 788, §1; 852, 1º). Family life education, seminars, workshops and congresses are means of evangelizing polygamous families. To the extent possible, they should be required components of the pastoral program.

Sacramental life is the foundation of the Christian family. Hence, a purposeful program for formation about all sacraments should be emphasized by the diocesan pastoral plan. In addition to preparation for the sacraments of initiation, catechumens must also be prepared for the eventual celebration of the sacrament of penance and taught the meaning of other sacraments that they may receive during the course of their Christian life. Parents must be prepared for the baptism of their children (c. 851, 2°). Baptized children must be prepared for confirmation, penance, and first Holy Communion (cc. 889, §2; 913-914; 987-989).

A proper catechesis on marriage, stressing marital unity and indissolubility, is needed for both youth and couples, including those currently in irregular marriages due to polygamy. This catechesis is to be done in every stage of instruction, including an emphasis on personal and familial prayer, the marital covenant, family life and welfare, and other aspects of the Church's teaching on marriage.[121]

Pope John Paul II, in his Post-synodal Apostolic Exhortation on the Family *Familiaris consortio*, insisted on the preparation of young people for marriage and family life. Christian values concerning married and family life must be passed on through a gradual process of formation involving parents, society and the Church. This marriage preparation is a continuous process with several stages—remote, proximate, immediate and ongoing.[122] A clear and unambiguous

[120] See CONGREGATION FOR THE CLERGY, *General Directory for Catechesis*, 11 August 1997, Vatican City, Libreria editrice Vaticana, 1997, nn. 60-68.

[121] See P. PENGO, "Pastoral Care of the Traditional and Modern Polygamous," in *African Ecclesial Review*, 28 (1986), p. 211.

[122] Cf. *FC* 66; c. 1063. These stages are treated at length in PONTIFICAL COUNCIL FOR THE FAMILY, Document (unidentified), "Preparation for the Sacrament of Marriage and Its Celebration," (booklet), 13 May 1996, Libreria editrice Vaticana, 1996.

catechesis appropriate to age groups and stage of life "can lead to both an understanding and an acceptance of this Christian imperative by which the spouses imitate Christ in his unconditional giving of self."[123]

> Education for marriage should begin in the home because children develop their attitudes toward marriage and family living in the early years of life and it should continue as a part of the total education of the individual in school, church, and community. Specific information should be given expectant parents about infant and child care; to parents of preschoolers about dealing with questions children ask; to parents of teen-agers about adolescence and the physical and interpersonal problems that arise in this period; and to parents of young adults themselves concerning facilities for meeting suitable persons of the opposite sex and methods of evaluating their potentialities as marriage partner. Such education should involve preparing engaged couples to deal with the natural adjustments of early marriage.[124]

It is not unusual for couples to avoid marrying according to the canonical form because they lack the financial means for a "church wedding." Accordingly, efforts should be made to educate couples about the true meaning of Christian marriage and the advantages of a simple marriage ceremony, thereby minimizing expenses for such secondary matters as clothing and the reception. They should also be taught that, even if they lack a sufficient dowry or bride price, this should not hinder a marriage in Church. Couples should be shown the futility and adverse consequences of the exaggerated expenses that go beyond their means. This will enable those who are not wealthy to avail themselves of a marriage recognized as valid and sacramental in accord with the canonical form (c. 1108). It may, moreover, help reduce the oppression and exploitation of women, something which is inherent in the bride price system whereby the woman seems to be bought and thus considered a commodity or the property of the husband.

Ideally, catechists should have access to the assistance of marital or pastoral counselors in the preparation of persons for marriage.[125] This may especially be needed with respect to persons in polygamous marriages to help them face the difficult decisions involved in the regularizing of their marital situation.[126] Where the human and economic resources are available,

[123] DE MÛELENAERE, *The Canonical Significance of Marital Fidelity among the Bantu of South Africa*, p. 234.

[124] E.H. MUDD et al. (eds.), *Marriage Counseling: A Case Book*, New York, Association Press, 1958, p. 477.

[125] See MUDD et al. (eds.), *Marriage Counselling*, p. 261.

[126] See J. PATTON, "Pastoral Counseling," in R.J. HUNTER et al. (eds.), *Dictionary of Pastoral Care and Counseling*, Nashville, Abingdon Press, 1990, pp. 849-850. Cf. E.P. WIMBERLY, *Pastoral Counselling and Spiritual Value: A Black Point of View*, Nashville, Abingdon,

the diocesan pastoral program should therefore include provision for pastoral counseling of those in the catechumenate, pre-marital preparation, and other stages of Christian formation.

In the course of catechetical instruction, it is important to let polygamists know that they are valued and loved by the Church and, irrespective of their irregular marriage, have prerogatives in the Church which permits them to participate in some activities proper to Christians (cf. cc. 206; 788; 1170; 1183, §1).[127] They have the right to be evangelized, to be received into the Christian community, and to be given ongoing catechesis to influence them to live as good people. They should be encouraged to come to church, continue to seek instruction, attend meetings, be involved in good works, and participate in various activities like joining the parish choir, visiting the sick, and being associated with a small Christian community. These aspects of Christian living, together with a more formal catechetical instruction, will encourage them and enable them to feel that they are being respected and valued and will assist them enormously in their formation for their eventual initiation into the Christian community.

6 — *The Apostolate of Women*

Polygamy is one of the manifestations of the oppression of women in sub-Saharan Africa. As a social-cultural institution, polygamy has degraded women and enslaved them for quite a number of centuries. One of the ways to do away with this oppression is through the apostolate of women in polygamous societies. This apostolate by women will assist women in fighting against maltreatment and practices that oppress them and in becoming conscious of their dignity and identifying their rights such as inheritance,[128]

1982, pp. 19-25; D. LYALL, *Counselling in the Pastoral and Spiritual Context*, Buckingham, Open University Press, 1995, pp. 31, 36-38.

[127] "Although catechumens are not yet members of the faithful, they are incorporated in a way which is neither full nor conclusive in the ecclesiastical community ('coniunguntur cum Ecclesia, quæ eos iam ut suos fovet'). They may participate in activities proper to Christians, but not in those that are exclusive to Christians." J. HERVADA, "Christ's Faithful (cc. 204-231)," in *CCLA*, p. 167.

[128] In polygamous families there is an increased loss of property rights by widows because the customary laws deny women inheritance rights. This contributes to their poverty, which in turn accelerates polygamy. The Church in sub-Saharan Africa, in collaboration with organizations such as the Young Women's Christian Association, can offer assistance and support to women by educating them about the laws and by offering legal assistance through lawyers and community workers who are knowledgeable about inheritance laws.

the right of girls to join religious life and acquire an education in school, and the right to development and self-reliance projects.

6.1 — Opposing the Oppression of Women

In sub-Saharan Africa, the position of women leaves much to be desired. The polygamous culture has always benefited men, mainly at the expense of women. This situation has contributed to the emergence of "the apartheid of gender" in which the status of women is inferior to that of men. Women are given less recognition, and they often find themselves in vulnerable positions, exposed to exploitation and other evils. Therefore, the position of women in polygamous families and in the life of the Church in sub-Saharan Africa merits particular attention.

"In many societies in Africa, cultural imperatives result in insensitivity, especially in human rights."[129] In polygamous families, women are oppressed and exploited, used like instruments of cheap labour, contrary to their dignity and human rights. Additional wives are considered a way to increase the size of a man's household and thereby to attend thoroughly to his domestic needs. Many wives enable the man to gain social recognition and distinction, offering entertainment to his neighbours and friends by providing the additional food needed for a feast to serve the guests. In some cultural contexts, the wife is compared to an eye: "To marry one wife is like being one-eyed, while having two wives is like having *two eyes* and therefore capable of seeing far and wide."[130]

In polygamous families, women clearly do not have the same status as men but remain inferior to them. They have little chance of asserting themselves as free human beings or improving themselves as persons. They always remain the victims of polygamy, contrary to canonical norms which insist on the dignity and rights of women.[131] "With few exceptions," writes McDermott,

[129] Symposium of Episcopal Conferences of Africa and Madagascar, *The Church as Family of God: Instrumentum Laboris: Pastoral Letter*, Accra, SECAM Publication, 1998, p. 30.

[130] J.K. Kahiga, "Polygamy: A Pastoral Challenge to the Church in Africa," in *African Ecclesial Review*, 49 (2007), p. 125.

[131] "Women are members of the laity (c. 207, §1) or consecrated to God through the profession of the evangelical counsels by means of vows or other sacred bonds recognized and sanctioned by the Church (c. 207, §2). Women as members of the Christian faithful share with men the rights and obligations set forth in the canons (cc. 208 and 223). Likewise, lay women share rights and obligations with lay men (cc. 224-231). Women enjoy an equal status with men in the determination of domicile (c. 104), in changing rite at the time of marriage (c. 112, §1 no. 2), in establishing associations of the faithful (c. 299, §1) or

"the Christian faithful share a common juridic status in the 1,752 canons of the 1983 Code of Canon Law. Women are recognized in law as members of the Christian faithful, baptized in Christ, incorporated into the Church, and constituted persons with duties and rights proper to Christians in accord with their condition (c. 96)."[132] The Synod of Africa stated that it "affirms strongly the rights and duties of women in building up the family and taking full part in the development of the Church and society."[133] A good strategy to achieve this objective is to place great emphasis on mobilizing women and educating them to participate fully in achieving all rights owed to them. The forming of Catholic women's groups and other groups, such as Women in Development / Gender in Development,[134] will help in educating women about their rights and dignity and fighting against maltreatment. It can help them advance spiritually, educationally, economically and morally. Women's associations can also help them protect their rights under the traditional laws and customs.

6.1.1 — *Dignity and Rights of African Women in the Family*

Historically, women everywhere were in a state of subordination to a greater or lesser extent. Law, which regulated the relations of men in society, sanctioned the subjection of woman. For example, the Barbarian society that co-existed with the Greco-Roman world, founded as it was on force, showed no great willingness to recognize the personhood of woman; her legal status was one of perpetual tutelage.[135]

joining them (c. 298), and in choosing a place for Christian burial (c. 1177)." McDERMOTT, "Woman, Canon Law on," p. 820.

[132] McDERMOTT adds: "The Second Vatican Council affected a notable shift in the ecclesial perspective of women and major changes in her canonical status in the universal law of the Church. Biblical and theological insights, the concept of the Church as *COMMUNIO*, conciliar regard for significant human values such as the human dignity and social advancement of persons, resulted in a significant change in the Church's attitude toward woman. This gradual evolution can be traced through the antepreparatory and preparatory documents, conciliar discussions, and the definitive texts of the council. Pope John XXIII in *Pacem in terris* addressed the social progress of woman and decried the deprivation of her fundamental rights in many parts of the world. Conciliar documents, particularly *Lumen gentium* 32, *Gaudium et spes* 9, 29, 60 and *Perfectae caritatis* 15, addressed woman's dignity as person, her equality with man and corresponding rights and responsibilities in the mission of Christ." Ibid.

[133] SYMPOSIUM OF EPISCOPAL CONFERENCES OF AFRICA AND MADAGASCAR, *The Church as Family of God*, p. 30.

[134] See FIRST SYNOD OF THE ARCHDIOCESE OF ARUSHA, "The Church Christ Wants Us to Be," Arusha Archdiocesan Communication Department, 1998-2000, pp. 18-19.

[135] M. OSTROGORSKI, *The Rights of Women: A Comparative Study in History and Legislation*, Philadelphia, Porcupine Press, 1980, p. xi.

It is noteworthy to observe that, in the course of history, the rights of women were altered. As social and economic conditions developed and changed during the Middle Ages, the single woman gradually freed herself from legal restrictions. This was especially true in the domain of private law. With the advent of the feudal system, if one had attained nobility and political power, there was the possibility of owning land. Thus, women of noble birth were able to inherit land and take ownership of it. When the French Revolution first erupted, the rights of women were not primarily changed. However, women did play a big part in the French Revolution and, since equality was the main staple for change for the advocates of this political upheaval, women were included and treated somewhat equally. By examining the laws of the different countries as to the position of woman with regard to the exercise of political and public rights, one may follow the women's rights movement through its various phases in different regions and to perceive the limits provisionally assigned to it by the conscience of the civilized world.[136]

"Change" does not have the same value for all women. For some it brings hope, but for others it brings dread. One can only think of the poorest of women in sub-Saharan Africa who are unconcerned with social progress unless it brings food and other necessities for their families. Their priority is their families, keeping them safe and fed. They see little value in becoming liberated from traditional strictures. To restore the dignity and rights of African women in the family, there is a need for the particular Churches in sub-Saharan Africa to be unanimous in condemning the customs and practices that deprive women of their rights and their dignity as human beings, for example, female circumcision, sexual exploitation, cultural subjection, and economic and educational deprivation.

In polygamous cultures, many women feel they have little choice but to obey the laws of the culture. They know that the husband can and will marry a second wife so, very often, the first wife herself participates in searching for the right woman who will be a good companion, thereby seeking to prevent the man from bringing home a second wife who will contribute to disharmony and perpetual strife in the extended family. She participates in polygamy not because she herself wants her husband to take another wife but to avoid a lesser evil. This way of thinking cannot be overcome without assistance from other women.

With the Christian apostolate of women, the modern sub-Sahara African woman who suffers perpetual slavery under male chauvinism can come to

[136] See ibid., pp. xi-xiv.

know her marital rights, recognize her human dignity and be made aware of the fact that she is equal. [137] Thus, she can become more assertive with this knowledge and awareness. She can then choose not to tolerate any longer the continuous oppression of her husband.

6.1.2 — *The Special Needs of Girls*

Girls are typically those most victimized in a polygamist society. Most of them are deprived of their fundamental right to go to school because they are forced to marry. The majority are married below fourteen years of age—which is the legal minimum for validity in canon law (c. 1083, §1).[138] Worse still, when it is recognized that the baby to be born is a girl, a future marriage is arranged for her even before birth.[139] As a result of this "booking" of a girl baby, it is not unusual for a middle-aged man with several wives to marry a young girl of about twelve years of age.[140] Another problem is that men want to marry women or girls who have little or no education because they fear to have their traditional role challenged. They believe that such women, who are not trained in any skills, will be submissive and good wives. This is but another manifestation of oppression of women in polygamous cultures.

[137] "A woman's dignity is closely connected with the love which she receives by the very reason of her femininity; it is likewise connected *with the love which she gives in return*. The truth about the person and about love is thus confirmed." JOHN PAUL II, Apostolic Letter *Mulieris dignitatem* on the Dignity and Vocation of Women on the Occasion of the Marian Year, 15 August 1988, Rome, Vatican Polyglot Press, 1988, p. 109.

[138] The marriage of a non-Catholic younger than fourteen would be recognized as valid in canon law provided it is valid in the civil law, unless there were some basis in the divine positive or natural law for its nullity.

[139] "The notion of a foetus as thing of God is also associated with a coercive form of foetal betrothal. A man may approach a pregnant woman and beg for her unborn 'daughter' with the gift of the anointment, by smearing butter across her womb. The child might of course be male or die young. However, the suitor has taken his chance, and if the child is born a girl and survives to the age of marriage, it is as if God has shown a favour towards the suit, and it would be dangerous to offer her to any other man. If the child is a boy who survives, then again this is God's will and he and the suitor should become close 'stock friends', a term that also refers to the navel-string." P. SPENCER, *The Maasai of Matapato: A Study of Rituals of Rebellion*, London, Manchester University Press, 1988, p. 39.

[140] "It is the elders, and especially her father, who determine her marriage to a man who is normally at least twice her age, and occasionally even four times or more. Her removal to a totally new and strange milieu is an awesome prospect to which she has been conditioned from her earliest years. She is offered no alternative other than to accept her obligation to honour her father's choice with his blessing or to risk his anger, which would have the effect of a curse." Ibid., p. 14.

It is important for local churches in sub-Saharan Africa to help negate these cultural and family pressures on girls. For one thing, Church-run schools should be open to non-Christian children of polygamous families so that girls may learn about their inherent dignity and rights, including the right to an education and to pursue their own vocation in life. Other strategies should also be attempted, like vocational groups in small Christian communities, schools and training centres. Also of great value is an educational plan that makes a deliberate effort to respond to the particular needs of girls in these societies, seeking to ensure that they have a quality education that will allow them to make free choices in life, among which may include the choice to pursue the consecrated life in a religious institute.

6.2 — Education for Development and Self-Reliance

Christians believe that they are called to participate in the ongoing creation and redemption of the world, which means assuming responsibility for this world and in particular for human development. This call is not limited to the progress of the baptized but to all people created in the image and likeness of God, including polygamists. Social development work aiming to free people from poverty through self-sufficiency is not something incidental to the evangelization of polygamous families but must go hand in hand with it. Self-reliance projects must be considered in parallel with the work of evangelization.

Polygamy, though rooted in culture, is often maintained and accelerated by poverty, especially on the side of women. Many women in polygamous families are poor. In some cases, a polygamous husband is in a good position to offer a poor girl greater social and economic security, with lands and a better home, greater prestige within the community, and other goods valued in her society.[141] In this situation, it is completely understandable how poor girls and their parents would find attractive the marriage proposal of a wealthier man. These poor girls accept marrying rich men, not for better or worse, but only because of their wealth and the security and status it will bring.

Therefore, it is incumbent upon the Church in sub-Saharan Africa to make every effort to improve the situation of women in every possible way, not only in the sphere of education but also in their socio-economic condition. This can be done by providing women with an education for development and

[141] W. BLUM, *Forms of Marriage: Monogamy Reconsidered*, Nairobi, AMECEA, Gaba Publications, 1989, p. 109.

self-reliance. They need to be made aware of available social services and assisted in developing self-reliance projects which will help them to eradicate poverty.

The Church's ministers and leaders cannot live the polygamous women's lives for them. What they can do is act as catalysts, bringing to light the need for and the possibilities of action. The Church can help them sensitize local leaders, help them decide on the programs and then aid them in implementing these programs by putting them in touch with the appropriate social agencies. Self-reliance projects can assist women in polygamous families to help themselves and avoid depending on the rich men who marry them. The goal is to empower women in polygamous societies to be engaged in social development that is holistic, enabling them to grow fully and mature spiritually and physically in relative security by means of reducing oppression and poverty. This will also enable them to achieve greater independence from traditional cultural strictures.

7 — *Justice and Peace*

The Church in sub-Saharan Africa faces deep crisis, contradictions and strife, abuse of human rights, and disregard for human dignity. This situation makes the apostolate of evangelization difficult. The Second African Synod took place in Rome in October 2009 on the theme, "The Church in Africa in Service to Reconciliation, Justice and Peace." Its aim was to help bring reconciliation, peace and justice in African societies. Therefore, justice, peace and reconciliation are to be considered not as some specialized functions suited only to those specially trained but as part of deeper process of evangelization.[142]

There is no apostolate whatsoever that could be undertaken and succeed in polygamous families without incorporating justice and peace into its model and then applying this model to every family member. It is the duty of the Church in sub-Saharan Africa to contribute to justice and peace of her people. Unless evangelization integrates them and uses them successfully, it cannot be complete and integral. Likewise, justice and peace will not be well understood nor be well propagated in the Church unless evangelization takes them up successfully. The extensive failure of the attainment of principles of justice

[142] O. MUBANGIZI, "Agent of Reconciliation, Justice, and Peace: The Church in Africa in an Era of Globalization," in A.E. OROBATOR (ed.), *Reconciliation, Justice, and Peace: The Second African Synod*, Maryknoll, New York, Orbis Books, 2011, p. 111.

and peace in Africa has been attributed to inept evangelization, or evangelization not well understood and not well received.[143]

> Even if the relation of inculturation to justice and peace may not be directly clear, it is plausible to regard justice and peace as the outcome of an inculturated evangelization when the African Christian will be able to understand, for example, what the Gospel means by love, charity, justice, peace and neighbor; and indeed, what it means to be a Christian or to be human from a perspective nearest to his or her imagination. For the present trend of affairs with rampant injustices and unrest show that the people have not yet grasped the Gospel. The success of inculturation in Africa will affect evangelization and therefore the understanding of the Gospel, and consequently the valuation of justice and peace.[144]

Justice and peace must be strengthened as an approach to evangelization in polygamous societies. It is also the ideal of the Pontifical Council for Justice and Peace, so that justice and peace in this world may be strengthened in accordance with the Gospel and the social teaching of the Church.[145] This requires commitment, such as by means of a committee or similar organ that will facilitate and coordinate all matters related to justice and peace.

7.1 — Commitment to Justice and Peace

The Church in sub-Saharan Africa should denounce and completely disassociate herself from evil deeds that go against justice and peace in the society and try to be a living example, excellent and resolute in demands for these important elements. The Church must commit herself to all issues pertaining to justice and peace. A commitment to justice, peace, human rights and human promotion is a witness to the Gospel when it is a sign of concern for persons and is directed towards integral human development (*RM* 20).[146]

The existence of disharmony and perpetual wars in polygamous families is something quite possible. This may be caused by the favouritism, infidelity or discrimination on the part of the husband, enmity among the children of other wives and jealousy between the co-wives. "The union of minds between the one man and the two or more wives is a recipe for disaster. Competition between the two wives will ensue in terms of who wins the man's authentic attention and love. It so seems that the man is incapable of

[143] MBYEMEIRE, *A Theological Analysis of the Problem of Justice and Peace*, p. 6.
[144] Ibid., pp. 6-7.
[145] JOHN PAUL II, Apostolic Constitution *Pastor bonus*, 28 June 1988, in *AAS*, 80 (1988), pp. 841-930, art. 142.
[146] *Encyclical Letter Redemptoris missio*, p. 32.

intellectually appreciating the two equally, he certainly will love one and despise the other which in itself might lead to discontent and conflicts in respect to the distribution of resources."[147]

Without justice and peace for every age group, gender,[148] and the entire society, it will be very difficult to approach the problem of polygamy. So there is a need for it to be defended by the Church in sub-Saharan Africa to ensure that no one in the polygamous families is being deprived of this human right. It is the duty of the Church to help all people understand that one person's lack of justice or peace today is everyone's problem and that activity on behalf of justice and peace is no longer just an available option but is rather an urgent necessity. Christian concern for justice for all God's people is part of the actual core of Christian life.[149]

7.2 — Committee of Justice and Peace

A committee of justice and peace is an organ that may facilitate the exercise of justice and peace and, at the same time, coordinate all matters relating to it. The personnel indentified with this committee should be well qualified and able to deal appropriately with all issues relating to justice and peace. The committee must undertake efforts to eradicate discrimination, marginalization, and any kind of oppression in polygamous societies.

The committee will have the duty to educate people about the matters of justice and peace, collaborate with the diocese on issues related to justice and peace, and with this collaboration defend and stand firm on these issues within polygamous families. For example, they should teach, offer advice, and especially encourage men in polygamous families to recognize the rights of women and girls. They should also stand with these women as they fight for equal opportunity in education and the acquisition of property. This committee should emphasize to both men and women in polygamous society the importance and dignity of each human life.

> From faith human communities of all parts of the world and all ages of human history have drawn the hope that the peace which is so needed for human societies is also something possible of attainment. From reason alone it is possible to build up an understanding of what is meant by peace that goes beyond absence of war to the substance of genuinely peaceable

[147] KAHIGA, "Polygamy: A Pastoral Challenge to the Church in Africa," p. 127.

[148] The issue of gender was one of the topics discussed in the Second African Synod. See A. ARABOME, "Woman, You Are Set Free: Women and Discipleship in the Church," in OROBATOR, *Reconciliation, Justice, and Peace*, pp. 119-129.

[149] WALSH, *Integral Justice*, p. 109.

> society. From faith comes the conviction that peace is a divine gift which we can receive only upon the terms on which it is offered, terms which require an appropriate response. […] The testimonies of the religious traditions insist that peace has a price, and it begins with a personal discipline of peacefulness. But a peaceable future also has to be nurtured in the next generation, and a peaceable nation has to be built by many levels and types of social and political action.
>
> Peacemaking requires many aspects of personal discipline and nurturing. It also requires much collaboration, patient negotiation, the employment of much knowledge and of many skills. But at the heart of it all is the simple human faculty for compassion.[150]

Conclusion

We have suggested a number of possible canonical and pastoral approaches that support the Church's mission to evangelize polygamous societies. These have been organized under seven headings: the concept of evangelization, inculturation and the evangelization of cultures, evangelization in polygamous societies, communicating the Good News, the diocesan pastoral plan, the apostolate of women and justice and peace. The implementation of these canonical and pastoral approaches requires the collaboration and commitment of all agents of evangelization. Although there are no sure-fire solutions to the problems of polygamy, a concerted and organized effort, particularly at the level of the diocese, can go a long way toward facilitating the conversion of polygamists to Christianity and at the same time upholding the Church's teaching on marriage.

Church law requires that people involved in a polygamous union are to regularize their marital situation before being admitted to the rite of election and sacramental initiation. Before laws can be accepted, there must be sufficient faith by which the person can trust that the Church's laws are just and applicable to oneself. This may require long years of first evangelization and evangelization before a person's faith ripens and matures. To facilitate the building of this faith foundation, the Church's teaching and laws must be applied with canonical equity, pastoral prudence and the spirit of the Gospel in dealing with particular subjective situations, and always in harmony with the supreme law of the Church which is the salvation of souls (c. 1752).

[150] M.K. HELLWIG, *A Case for Peace in Reason and Faith*, Collegeville, MN, The Liturgical Press, 1992, pp. 104-105.

Polygamy is rooted deeply in culture. A social institution in existence for many centuries, it cannot be abolished in just a few years, decades or perhaps even centuries. That fact being acknowledged, we are convinced that the pastoral and canonical approaches proposed in this study, while supporting the Church's stance on monogamy, can go a long way to facilitate its mission of evangelization and pastoral care of those living in polygamous unions. These approaches allow for a solid, multi-faceted formation and transformative experiences that can help inquirers and catechumens grow in faith, guiding and assisting them step by step from the grassroots so that they ultimately are prepared to make the necessary sacrifices to embrace the Good News and the Church of Christ, which subsists in the Catholic Church (c. 204, §2).

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TOWARD REFORM OF THE FIRST CRITERION FOR ADMISSION TO THE ORDER OF VIRGINS

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SUMMARY — The 1970 Rite of Consecration to a Life of Virginity establishes three criteria for admission to the order of virgins. As currently phrased, however, the first criterion, and to some degree the second, if applied according to their terms, represent a significant but largely-unrecognized break with the criteria developed by the Church specifically for use in determining a woman's eligibility for virginal consecration. This article identifies weaknesses in the current first and second criteria for consecration, sets forth the traditional criteria for assessing *in facie Ecclesiae* a woman's eligibility for consecration, and suggests reformulations of the criteria to reflect better the character and charisma of this important and reemerging order in the Church.

RÉSUMÉ — Le rituel de la consécration des vierges de 1970 énonce trois critères d'admissibilité à l'ordre des vierges. Tel qu'il est actuellement formulé, le premier critère, et dans une certaine mesure le deuxième, s'ils sont appliqués selon leurs termes, représentent une rupture significative, mais largement non reconnue, avec les critères spécifiquement établis par l'Église pour déterminer si une femme est admissible à la consécration virginale. Cet article identifie les faiblesses des premier et deuxième critères actuels d'admissibilité à la consécration, énonce les critères traditionnels d'évaluation de l'admissibilité d'une femme à la consécration, tels qu'énoncés in Facie Ecclesiae, et suggère de reformuler certains des critères pour mieux refléter le caractère et le charisme de cet ordre important et ré-émergent dans l'Église.

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Introduction

Paragraph five of the Introduction to the Rite of Consecration to a Life of Virginity sets out three criteria for the admission of women living in the world to consecration as virgins, namely: (a) that they have never been married or lived in public or flagrant violation of chastity; (b) that by their age, prudence, and universally attested good character they give assurance of perseverance in a life of chastity dedicated to the service of the Church and of their neighbor; (c) that they be admitted to this consecration by the bishop who is the local ordinary.[1]

Considering these criteria in reverse order, the third criterion (admission to consecration by a bishop) is not so much a criterion for admission to the order of virgins as it is a delineation of the mechanism by which a woman's virginal consecration is publically received by the Church. Reasonable in itself and consistent with long-standing practice in this area, this criterion provokes no controversy.

The second criterion (assurance of perseverance in a life of chastity) is, I suggest, a positive requirement for virginal consecration that looks toward a woman's future conduct. Most of the formation that candidates for consecration undergo prior to admission is concerned with helping a candidate for consecration prepare for and commit to this life. Reasonable in itself and generally consistent with the Church's tradition in regard to the consecration of virginity, this criterion, but for a small textual amendment to be proposed below, is also sound.

But the first criterion for admission to consecration (ascertainment that a woman has never been married or lived in public or flagrant violation of chastity) is, I suggest, quite flawed. A negative requirement (actually a *dis*-qualification) for consecration concerned with a woman's past conduct, the first criterion for virginal consecration ignores and/or misapplies almost all of the well-settled discipline that the Church had developed precisely for

[1] See SACRA CONGREGATIO PRO CULTO DIVINO, "Praenotanda [ad novum consecrationis virginum ritum promulgandum]" (21 May 1970), in *Notitiae*, 6 (1970), pp. 314-316; Eng. trans. in *Canon Law Digest*, vol. VII, pp. 422-425, at p. 423; INTERNATIONAL COMMISSION ON ENGLISH IN THE LITURGY, *Documents on the Liturgy 1963-1979*, Collegeville, The Liturgical Press, 1982) [hereafter, DOL], n. 395, pp. 1025-1027, at 1025; and *Rites of the Catholic Church*, 2 vols., Glendale, Pueblo, 1976/1980, vol. II, pp. 132-134, at 133. This study focuses on criteria applicable to women living in the world who seek consecration as virgins, but much of the analysis offered here applies to female religious seeking such consecration in accord with paragraph four of the Rite of Consecration. At present men are not admitted to consecration as virgins in the Roman Church.

determining who is eligible for consecration as a virgin. Indeed, if taken at face value—as those unfamiliar with the institution of virginity in the Church are likely to take it—this first criterion threatens, I fear, a serious rupture with the Church's traditional criterion for eligibility for admission to the order of virgins.

Failing even to use the words "virgin" (*virgo*), "virginity" (*virginitas*), or equivalent terms of art (e.g., *integritas carnis*), this first criterion treats as eligible for admission to the order of virgins some women who, under the traditional criteria for consecration, would not be eligible, yet excludes some women from consecration who, under the traditional criteria, would be considered eligible. This first criterion (and to some degree, the second, too) blurs pastorally important distinctions between virginity and chastity, occasions invasions of conscience among candidates for consecration, and generally leaves candidates, formators, and bishops bereft of concrete guidance in selecting and preparing candidates for consecration as virgins. These difficulties have come about, I suggest, as a result of the decision to adopt, not the criteria developed by the Church over many centuries of use in admitting women to consecrated virginity, but instead, novel language ill-suited to the goal of identifying women who are in law and fact eligible for consecration as virgins in the Church.[2]

This article illustrates the deficiencies of the current criteria for admission to consecration as a virgin (especially the first criterion), outlines the Church's traditional understanding of virginity in general and of consecration to virginity in particular, and proposes, in place of the current first criterion for eligibility (which I think should be abandoned outright), language that much better serves the on-going revival of this beautiful charism in the Church.[3] We begin with an overview of the history of consecrated virginity in the Church.

[2] This study does not assume that numerous ineligible women have been admitted to virginal consecration. Although anecdotal evidence suggests that some questionable admission decisions have been made, one may be reasonably confident that the vast majority of consecrated women admitted to consecration were eligible for consecration according to both traditional and modern criteria. Rather, this study is driven, first, by a general concern for the soundness of law in the Church, and second, by indications that some women have been declared *ineligible* for the order of virgins based on admission criteria that are themselves fundamentally flawed, this, to the obvious detriment of these women but also to the diminution of the witness that the order of virgins offers the Church and the world.

[3] On Christian virginity as a charism in the Church, see generally Raniero CANTALAMESSA, *Virginity*, C. SERIGNAT (trans.), New York, St. Paul Books, 1995, esp. pp. 55-67.

1 — *Summary of the History of Virginity*[4]

Sacred scripture and the writings of the Fathers amply attest to the witness of women who chose to lead a life of virginity for the Lord.[5] Over the centuries, however, Christian virginity as a way of life was gradually absorbed into religious life such that, by the time of the Council of Trent (1545-1562), Christian virginity was no longer specially practiced outside of the convent and, even within religious life, it was largely ignored (or better, taken for granted). In 1868, invoking an elaborate but nearly forgotten rite in the Roman Pontifical,[6] the great Dom Prosper Guéranger of Solesmes arranged for the consecration of seven Benedictine nuns as virgins.[7] Still, as late as 1927 the (Sacred) Congregation for Religious forbade extending this sacramental to women living in the world.[8] Nevertheless, modern interest in consecrated virginity persisted and, prior to the Second Vatican Council,

[4] For a basic bibliography of the history of the institution of Christian virginity, see A. NOCENT, "The consecration of virgins," in A. MARTIMORT, et al. (eds.), *The Church at Prayer: An Introduction to the Liturgy*, in 4 vols., Collegeville, Liturgical Press, 1987, vol. III, pp. 209-220 [hereafter, NOCENT], at 209-210. For immediate overviews of the history of virginity in the Church, see, e.g., P. CAMELOT, s.v. "Virginity," in *The New Catholic Encyclopedia*, 2d ed., Gale, 2003, vol. XIV, pp. 544-548; James KRUC, "Canon 604: Historical Overview and Canonical Analysis of Consecrated Virginity," J.C.L. Thesis, Washington, The Catholic University of America, 2008 [hereafter, KRUC], pp. 5-20; and David KINISH, "The Consecration of Virgins," in *American Benedictine Review*, 4 (1953) [hereafter, KINISH], p. 115-134, esp. pp. 116-120.

[5] The mere fact that one is a virgin, or even that one has remained a virgin by choice, is not regarded as a Christian virtue unless that virginity is chosen for the Lord. See PIUS XII, encyclical *Sacra virginitas* (25 March 1954), in *Acta Apostolicae Sedis*, 46 (1954), pp. 161-191, at pp. 164-165, Eng. trans. in *The Pope Speaks*, 1 (1954), pp. 101-123, at p. 103.

[6] PONTIFICALE ROMANUM SUMMORUM PONTIFICUM JUSSU EDITUM BENEDICTO XIV PONT. MAX. RECOGNITUM ET CASTIGATUM, Mechliniae, Dessain, 1855, *De benedictione et consecratione virginum*, pp. 197-236. For a commentary on the rite, see Joachim NABUCO, *Pontificalis Romani Expositio Juridico-Practica,* in 3 vols., New York, Benziger, 1945, vol. I, pp. 445-465 [hereafter, NABUCO]. The classic history of the liturgical rites associated with the consecration of virgins is, of course, René METZ, *La Consécration des vierges dans L'Église romaine*, Paris, Presses Universitaires de France, 1954 [hereafter, METZ]. An abbreviated but updated version of this material is available in René METZ, *La Consécration des vierges: hier, aujourd'hui, demain*, Paris, Cerf, 2001.

[7] See NOCENT, p. 210, and METZ, p. 7.

[8] SACRA CONGREGATIO DE RELIGIOSIS, "[Responsum ad] Dubium" de consecratione virginum pro mulieribus in saeculo viventibus (25 March 1927), in *Acta Apostolicae Sedis*, 19 (1927), pp. 138-139, Eng. trans. in *Canon Law Digest*, vol. I, pp. 266. See also KINISH, pp. 124-125. POPE PIUS XII later reserved virginal consecration to nuns (*moniales*) in apostolic constitution *Sponsa Christi* (21 November 1951), in *Acta Apostolicae Sedis*, 43 (1951), pp. 5-24, esp. art. III §3.

more groups of women religious had received permission to be consecrated as virgins while a few women living in the world began to pronounce private vows of virginity.[9] Eventually the Fathers of the Second Vatican Council (1962-1965) called for the reform of the rite of consecration of virgins,[10] and in 1970 the revised Rite of Consecration to a Life of Virginity was promulgated. The Johanno-Pauline Code recognizes (or re-recognizes, if one prefers) consecrated virgins as an order in the Church,[11] and the Catechism of the Catholic Church devotes several paragraphs to explaining and extolling consecrated virginity.[12]

Despite the extensive treatment Christian virginity had received at the hands of the Fathers, the practical disappearance of consecrated virginity as a distinct way of life in the Church for most of the last millennium meant that when liturgical reformers tried to give effect to the conciliar call for reform of the Rite of Consecration they had precious few official sources to guide them.[13] Thus updating what was, in reality, a sophisticated ecclesiastical tradition on virginity would not be easy for men who brought little understanding of that special institute to their work. That this is not an unfair characterization of the conditions under which reform of the Rite of Consecration was attempted is shown, I suggest, by a remark made by Abp. Annibale Bugnini who, describing the work of his Consilium on consecrated

[9] KINISH, pp. 115, 128-130, and KRUC, pp. 21-23.

[10] SECOND VATICAN COUNCIL, constitution *Sacrosanctum concilium* (4 December 1963) n. 80. KRUC, at pp. 24-25, suggests that Pope Paul VI, because of his positive impression of women living under private vows of virginity, was instrumental in suggesting that the constitution on the liturgy issue a call to renew the rite of consecration.

[11] See *Codex Iuris Canonici auctoritate Ioannis Pauli PP. II promulgatus*, 75/2 (1983) 1-320, as corrected and amended, Eng. trans., Canon Law Society of America, *Code of Canon Law, Latin-English Edition, New English Translation*, Washington, Canon Law Society of America, 1999, canon 604 §1: "Hisce vitae consecratae formis accedit ordo virginum quae, sanctum propositum emittentes Christum pressius sequendi, ab Episcopo dioecesano iuxta probatum ritum liturgicum Deo consecrantur, Christo Dei Filio mystice desponsantur et Ecclesiae servitio dedicantur." English trans., "Similar to these forms of consecrated life is the order of virgins who, expressing the holy resolution of following Christ more closely, are consecrated to God by the diocesan bishop according to the approved liturgical rite, are mystically betrothed to Christ, the Son of God, and are dedicated to the service of the Church."

[12] *Catechism of the Catholic Church*, nn. 923-924, 1618-1620.

[13] KRUC, at p. 20, rightly calls these official sources "meager". What few official documents treated Christian virginity are, in terms of actually defining "virginity", "virgin", and related concepts, of little help today. For example, the rubrics of the pre-conciliar *Roman Pontifical* only alluded, once at that, to the requirement that a virgin seeking consecration possess "body integrity" (*carnis integritate*). Pius XII's encyclical *Sacra virginitas* does not define virginity or virgin.

virginity in the late 1960s, noted: "The Fathers of the Consilium … were dealing with material rather unfamiliar to at least the majority of them. Some voiced their bafflement, especially at the title 'Consecration of virgins' which they claimed was quite unintelligible to people today."[14] Setting aside the alarm that disclosures of "bafflement" over such elementary matters might cause for those concerned with the proper adaptation of consecrated virginity to modern circumstances, Bugnini's remarks help contextualize the criticisms of the first criterion (and to a lesser extent the second) about to be made here.

In support of the criticisms of the Rite of Consecration about to be offered here I will invoke several scholars who wrote about the ecclesiastical tradition on virginity. As indicated above, official treatments of the ecclesiastical institution of virginity are few,[15] but fortunately virginity and several related concepts received precise and insightful treatment by canonists[16] and

[14] Annibale BUGNINI, *The Reform of the Liturgy 1948-1975*, M. O'CONNELL (trans.) of *La riforma liturgica 1948-1975* [1983], Collegeville, The Liturgical Press, 1990, p. 787 [hereafter, BUGNINI]. See also Bugnini's comments describing interdicasterial confusion concerning various elements of the revised rite at *op. cit.* pp. 788-789.

[15] Besides KRUC at p. 20, see also Rose MCDERMOTT, "Canon 604: Admission to the Order of Virgins," in K. VANN, et al. (eds.), *Roman Replies and CLSA Advisory Opinions 1993*, Washington, Canon Law Society of America, 1993, pp. 46-47, also in P. COGAN (ed.), *CLSA Advisory Opinions 1984-1993*, Washington, Canon Law Society of America, 1995, pp. 163-164. McDermott suggests, in light of the scarcity of official norms in this area, that diocesan authorities "should be familiar with the canons for preparation, admission and on-going formation in consecrated life. In an analogous way, these canons can provide guidelines for a bishop or his delegate to determine the suitability of a candidate for the order of virgins." This is good advice, of course, but it should be followed *after* one has examined the well-established ecclesiastical tradition regarding virginity and the order of virgins even if, as we shall see, that tradition is largely preserved in scholarly, as opposed to official, literature.

[16] One might wonder why Pio-Benedictine canonists, writing during decades in which the Church did not recognize consecrated virginity as an ecclesial order, were concerned with virginity at all for, outside of the rare "veiling" of religious specifically as virgins, virginity and/or one's status as virgin was (and for that matter remains) irrelevant in canon law. See, e.g., KINISH, at pp. 121-122: "There is not one word about [consecrated virgins] in the [1917] *Codex Iuris Canonici*"; and Petrus PALAZZINI, s. v. "Virginitas", in P. PALAZZINI, (ed.), *Dictionarium morale et canonicum*, Rome, Officium Libri Catholici / Catholic Book Agency, 1962-1968, vol. IV, p. 678 [hereafter, PALAZZINI]: "Sed haec v[irginitas] nonnisi in mulierum velatione ab Ecclesia attendebatur". I suggest that pre-conciliar canonical interest in virginity arose thus: first, virginity could be the object of a private vow under 1917 CIC, c. 1307 and consequently questions concerning who was eligible to pronounce such a vow, exactly what that vow consisted of, the conditions under which it might be violated or could be dispensed, and so on, occasioned some canonical analysis; second, under Pio-Benedictine law (1917 CIC, c. 1058 §1) a private vow of virginity gave rise to a

moralists[17] during the decades in which consecrated virginity was beginning to reappear as a recognized way of life in the Church.[18] These writers, all of them *auctores probati* in the classical meaning of that phrase,[19] may be relied upon to have understood and faithfully expounded the Church's traditions concerning the institute of consecrated virginity.

We may now turn to the problematic first criterion for admission to consecrated virginity.

2 — *The Current Criteria for Admission to Consecrated Virginity Ignore Virginity*

An obvious but disconcerting question must be asked in regard to the first criterion for admission to consecration to a life of virginity, namely: does a woman need to *be* a virgin in order to be admitted to consecration *as* a virgin? The answer to this fundamental question depends, I fear, on whether one asks it of the well-established ecclesiastical tradition on virginity or of the current Rite of Consecration.

so-called "impeding impediment" to marriage, occasioning examination of these same questions for their potential impact on the liceity of marriage. Private vows of virginity, while still possible under Johanno-Pauline law (1983 CIC, c. 1191), no longer impede marriage, but the canonical analysis developed during decades when they did impact marriage remains useful in other contexts.

17 Moralists, like canonists, discussed virginity in so far as it might have been the object of a vow, of course, but more broadly in order to distinguish between virginity and chastity and to offer pastoral advice based on those distinctions. See generally those authors listed in fn. 18.

18 The consistency with which twentieth century canonists and/or moralists have addressed virginity in the Church allows one to prescind from copious, largely redundant, citations to numerous authors in illustration of various points and permits instead citation to just two or three authors. As trustworthy authorities on the institute of virginity, I suggest: Hieronymus NOLDIN (Austrian Jesuit, 1838-1922), *De sexto praecepto et de usu matrimonii*, 23rd ed., rev. by A. SCHMITT, Oeniponte, 1929 [hereafter, NOLDIN-SCHMITT]; Ludovico WOUTERS (Dutch Redemptorist, 1864-1933), *De virtute castitatis et de vitiis oppositis*, Giraudon, 1928 [hereafter, WOUTERS]; Authurus VERMEERSCH (Belgian Jesuit, 1858-1936), *De castitate et de vitiis contrariis* [1919], 2d ed., Rome, Gregoriana, 1921 [hereafter, VERMEERSCH]; Felix CAPPELLO (Roman Jesuit, 1879-1962), *Tractatus canonico-moralis de sacramentis*, 5 vols., 7th ed., Rome, Marietti, 1962 [hereafter, CAPPELLO]; James O'CONNOR, "Virginity and Chastity," in *American Ecclesiastical Review*, 140 (1959), pp. 17-26 [hereafter, O'CONNOR]; and Josephus FUCHS (German Jesuit, 1912-2005), *De castitate et ordine sexuali*, 3d ed., Rome, Gregoriana, 1963 [hereafter, FUCHS].

19 See generally 1917 CIC 20, *hodie* 1983 CIC 19.

Nemo dat quod non habet. A woman cannot consecrate her virginity to the Lord if she is not in possession of that virginity, and few pre-conciliar authors felt a need to state such an obvious point. Nevertheless, Noldin-Schmitt did state it, noting that (what we will call later "material virginity") "is the virginity that is required by the Pontifical for the solemn consecration of virgins in monasteries, and which is reserved only to virgins..."[20] Likewise, Vermeersch observed: "Sometime ago there used to be monasteries reserved *for virgins* who had been solemnly consecrated to God"[21] and referred his readers to the largely-forgotten rite of consecration of virgins found in the Roman Pontifical. And indeed that Pontifical, as we have seen, bade the consecrating bishop to inquire of women seeking admission to the order of virgins whether they were possessed of "body integrity".[22] Without anticipating our discussion of that term of art in the context of virginity, one may see in such a directive a requirement that women wishing to be consecrated *as virgins* must be possessed of some quality that set them apart *as virgins*.[23]

In stark contrast with the ecclesiastical tradition on virginity, however, the current Rite of Consecration, in the first criterion for admission to consecration as a virgin quoted above makes no demands regarding virginity. In fact, virginity is not even mentioned therein. The elimination of any reference to virginity in the fundamental criterion for admission to the order of virgins is unprecedented in ecclesiastical tradition, so startling, perhaps, that it has passed unnoticed for some decades.

Instead of inquiring in regard to the virginity of women seeking to be consecrated as virgins, the revised rite proposes (apparently taxatively) two ancillary matters to be inquired about in regard of candidates for consecration, namely, whether they have ever "been married or lived in public or flagrant violation of chastity" (*ut numquam nuptias celebraverint neque publice seu manifeste in statu castitati contrario vixerunt*). If, however, these two inquiries were intended to ascertain the *virginity* of candidates for consecration to virginity, they fail to accomplish that end.

[20] "Haec est illa virginitas, quae a Pontificali requiritur pro sollemni consecratione virginum in monasteriis, quae solis virginibus reservantur..." NOLDIN-SCHMITT, p. 3.

[21] "Existebant olim monasteria *virginibus* reservata quae Deo solemniter consecrabantur." VERMEERSCH, p. 136 (my emphasis).

[22] See fn. 13 and fn. 69.

[23] "What is the Church consecrating? What is she celebrating? In the rite of consecration, the Church is establishing as sacred *not only a person but a virgin-person* married to Christ …" Mary KLIMISCH, *The One Bride: The Church and Consecrated* VIRGINITY, New York, Sheed & Ward, 1965, p. 181 (emphasis added).

First, mere marriage does not cause one to lose one's virginity (specifically, as we shall see, what ecclesiastical tradition terms "material virginity").[24] Even after cohabitation by spouses, consummation (which would be destructive of virginity of course) is only *presumed* to have taken place (1917 CIC 1015 §2, *hodie* 1983 CIC 1061 §2), and such presumption yields to contrary evidence. Moreover, by making "marriage" a juridically relevant factor in assessing one's eligibility for consecration as a virgin, a host of canonically complicated questions about what kind of "marriage" counts toward one's having been "married" suddenly arise.[25] Whatever considerations led the Consilium to avoid plain words like "virgin", "virginity", or equivalent terms of art when describing the conditions impacting a woman's eligibility for consecration as a virgin,[26] what the revised rite does by making marriage a prime factor in assessing eligibility for consecration is to substitute an inquiry about a *condition* under which many women lose their virginity for an inquiry about the possession of virginity itself.[27]

Turning to the other inquiry posed within the first criterion for consecration, namely, that concerned with a woman having lived a life in public or flagrant violation of chastity, we can see that its deficiencies are deeper yet.

Immediately one notices that this language in the first criterion for eligibility for admission to the order of virgins (which language appears in the

[24] See, e.g., SABETTI, at p. 871, wherein: "[V]irginitas *proprie* respicit carnis integritatem, quae etiam post Matrimonium est possibilis" (original emphasis); see also NOLDIN-SCHMITT, p. 4, VERMEERSCH, pp. 146-147, and CAPPELLO, p. 304 who notes "Virginitati enim non matrimonium, sed eius usus opponitur."

[25] See Catherine DARCY, "Canon 604: Previously married person becoming a consecrated virgin", K. VANN, et al. (eds.), *Roman Replies and CLSA Advisory Opinions 1993*, Washington, Canon Law Society of America, 1993), pp. 48-50, also in P. COGAN, (ed.), *CLSA Advisory Opinions 1984-1993*, Washington, Canon Law Society of America, 1995, pp. 165-166. During the revision of the rite, the Congregation for the Doctrine of the Faith sought clarity with regard to this marriage issue, but their concerns failed to win modifications of the text. See BUGNINI, p. 789, fn. 4.

[26] Once one notices the avoidance of clear references to (material) virginity in modern ecclesiastical literature, one consistently perceives that avoidance throughout said literature, even in passages that seem, at first glance, to be supportive of virginity. To take but one example, Bugnini, underscoring the esteem with which the Church holds virginity, describes virginity as "an act of complete and perpetual spousal self-giving to God." BUGNINI, p. 788. Notice, however, that such a phrase could just as well describe a spousal self-donation by a virgin as it could a non-virgin. Lost in such language is any recognition of the uniqueness of the *virgin's* spousal act of self-giving, which uniqueness is, of course, foundational to the gift of virginity.

[27] I suspect this "marriage" language was lifted from another context in which it was narrowly relevant to the consecration of virgins and was inappropriately inserted into the revised rite to the detriment of the institution of Christian virginity. See fn. 67.

second criterion as well), addresses by its express terms "chastity" not "virginity". In so doing, a categorical error enters: chastity and virginity are not interchangeable words for the same reality.[28] Chastity and virginity differ from one another in certain respects and disregard of the distinctions between them leads to accepting criteria for consecration to virginity that, among other things, wrongly approach grave violations of chastity as if they were necessarily, in fact and in law, violations of virginity. They are not.

Briefly, chastity is a moral virtue related to the natural virtue of temperance and can be distinguished in various ways according to specific objects.[29] Among those various forms of chastity, virginity chosen for the Lord stands as its highest expression.[30]

Now, insofar as virginity is a higher calling than is chastity,[31] it might seem as if the requisites of chastity should certainly be satisfied prior to and throughout one's striving to honor those of virginity, and thus one could justify the revised rite's substitution of broader concerns for chastity in place of the narrower concerns of virginity in particular. But this conclusion is not correct; at the very least, it is incomplete, and the current rite's treating chastity as if it were another word for virginity when assessing a woman's eligibility for admission to the order of virgins is methodologically unsound and pastorally unjust. Simply put, while it is generally correct to hold the *future* conduct of a consecrated virgin to a higher level than that expected of other chaste women (as is set out in criterion two), it is wrong to hold a woman's *past* acts against chastity as necessarily having been *dis*-qualifying acts against virginity (as is set out in criterion one). To understand better why this is so, some background on how the ecclesiastical tradition reckons Christian virginity is helpful.

[28] O'CONNOR, p. 17.

[29] NOLDIN-SCHMITT, pp. 2-4; WOUTERS, pp. 7-8, 11-12; FUCHS, p. 27, and Benedictus MERKELBACH (Belgian Dominican, 1871-1942), *Quaestiones de castitate et luxuria*, 4th ed., Paris, La Pensée Catholique, 1936, p. 21 [hereafter, MERKELBACH]. These authors speak of, for example, the chastity of youth, matrimonial chastity, widower chastity, and Christian virginity.

[30] NOLDIN-SCHMITT, pp. 2-3; VERMEERSCH, pp. 137-147. It is commonly held that, when Christian virginity is observed throughout one's life by one who at last dies in friendship with the Lord, it wins for the virgin a special crown in Heaven known as an "aureole". See, e.g., VERMEERSCH, pp. 148-152; MERKELBACH, p. 22; WOUTERS, pp. 14-15, and Eduardus GENICOT (Belgian Jesuit, 1839-1914) & Ioseph SALSMANS (Belgian Jesuit, 1873-1944), *Institutiones theologiae moralis*, in 2 vols., 17th ed. (Uitgeverij, 1951) [hereafter, GENICOT & SALSMAN], vol. I, p. 200, n. 252. The aureole of virginity is not accorded those who, however chastely, even continently, they might have lived after losing virginity, are not virgins.

[31] FUCHS, pp. 29-34.

3 — *Scholion on General Ecclesiastical Criteria for Virginity*[32]

The most important distinction made by all pre-conciliar canonists and moralists in regard to Christian virginity—albeit a distinction that would escape the notice of those familiar only with the revised rite of consecration—is that virginity consists of two aspects, namely, a "material" or corporal aspect and a "formal" or intentional aspect.[33] Both aspects of virginity are required for one to be considered a "virgin" and thus to practice the virtue of virginity (whether as the object of a vow or as a consecrated state of life) but, as we shall see, these two aspects of virginity differ from one another in several important respects. We begin by addressing material virginity.

3.1 — Material virginity

Every human being begins life as a material virgin and for some time remains free of those acts by which material virginity is lost. Material virginity, sometimes called physical virginity, corporeal integrity, and so on, can only be lost as a result of certain physical actions performed with or on one's body. If those actions transpired (regardless of the circumstances, including moral circumstances), the loss of material virginity is immediate and permanent, and if they do not transpire (regardless of any other implications of the acts, including moral implications), loss of material virginity does not occur. Depending on the conditions under which those acts were performed with on or one's body, the resultant loss of material virginity might, or might not, as we shall see, preclude one from being recognized as a virgin for ecclesiastical purposes. The chief *sign* of material virginity in women is an intact hymen but all authors cautioned that the presence or absence of the sign of material virginity in women is not equivalent to the

[32] Even in its simplified form, the material presented in this scholion on the general ecclesiastical criteria for Christian virginity need not be grasped in order to recognize that the current criteria for determining a woman's eligibility for consecration as a virgin are flawed and should be reformed. The technical aspects of virginity as outlined in this scholion are assumed by the Church, *but not required*, when dealing with questions specific to the consecration of virgins. Some readers might therefore wish to proceed directly to the discussion of "Virginity *in facie Ecclesiae*", below, which sets out the admissions criteria that have long been, and should be now, applied in regard to the consecration of virgins.

[33] O'Connor, p. 17; Cappello, p. 303, n. 299; Fuchs, p. 28. I am going to suggest a clearer vocabulary for use in this area, but in this scholion, I will follow traditional vocabulary closely.

presence or absence of material virginity itself.[34] It is possible for the sign of material virginity to be absent (say, by natural defect), or even lost (say, by exercise or surgery), without virginity itself having been surrendered.

The question can now be framed: What sexual acts performed with or on one's body resulted in the loss of material virginity?

All pre-conciliar authors agreed that even a single act of penal-vaginal intercourse, regardless of the circumstances of that sexual intercourse, deprived both parties of material virginity.[35] Regardless of whether it was morally licit and/or resulted in orgasm (at least for the woman),[36] sexual intercourse always results in the loss of material virginity. That being understood, however, penal-vaginal intercourse is the *only* physical action that, in the unanimous opinion of experts discussing the institution of virginity, always causes a woman (or a man, for that matter) to lose material virginity. Every other physical action held by some (or many) authors to effect the loss of material virginity was either disputed by at least some authors in regard to that effect or found itself being treated in regard to some considerations besides that of consecration to virginity.[37]

[34] VERMEERSCH, p. 133; NOLDIN-SCHMITT, p. 3; CAPPELLO, p. 304. Some authors held, especially if the hymen were absent or ruptured independently of genital activity, that the initial 'expansion' of the vagina in coitus counted as a loss of material virginity. See, e.g., NOLDIN-SCHMITT, p. 3, and VERMEERSCH, p. 133. The practicality of this alternative measure of virginity is not clear but I mention it for completeness.

[35] As VERMEERSCH, at p. 133, states: "In omnium existimatione, *copula* est ipsissima virginis defloratio qua corporis integritas amittitur" (original emphasis). If pressed to describe more exactly what, in factually close cases, would constitute penal-vaginal intercourse, most pre-conciliar authors would likely have followed Ford and Kelly who noted that "[t]heologians speak of the 'marriage act', 'true marriage act', 'natural copula', 'perfect copula, 'natural intercourse', 'coitus' and 'act *per se* apt for generation'. As a general rule these expressions all mean the same thing … that the man at least partially penetrate the vagina and seminate partially in the vagina." John FORD (American Jesuit, 1902-1989) & Gerald KELLY (American Jesuit, 1902-1964), *Contemporary Moral Theology*, 2 vols., Newman, 1958/1963, [hereafter FORD & KELLY] vol. II, pp. 210-211. I recognize that even this description might not suffice to cover cases of, say, *condomized* penal-vaginal intercourse. While I am inclined to hold such acts as deflorational, it is not a point that need be resolved in order to carry the main assertions presented herein.

[36] Physiological differences between male and female orgasm were reflected, in part, in different canonico-moral evaluations of the event. See also fn. 36. Our only concern here is how that analysis might have impacted the admission of women to consecration as virgins.

[37] A common context in which material virginity was discussed was that of the *vow or virtue* of virginity. But caution against the uncritical importation of concepts associated with the *virtue or vow* of virginity into assessment of the *juridic* concept of virginity in the context of admission to consecration to a life of virginity is important for several reasons. First, it is generally held that the *vow* of virginity is not to be confused with the *consecration to a*

Now, besides holding that natural sexual intercourse destroyed material virginity, most pre-conciliar authors further held that any "completed" venereal act (to be explained below) also deprived one of material virginity.[38] This holding is perhaps, especially in an age of greatly lowered standards of sexual propriety, surprising, but hold it pre-conciliar authors did. Although it does not, as it happens, impact the conclusions of this article, the holding that any "completed" venereal act deprives one of material virginity needs to be understood if only to better appreciate the greatly simplified practice eventually developed by the Church for determining a woman's eligibility for admission to a life of consecrated virginity.

By "completed" venereal act most pre-conciliar authors meant any freely chosen act that was intended to and did result in orgasm.[39] Thus, for example, masturbation (solitary or partnered), intercourse *indebito in*

life of virginity, and earlier authors disputed whether such a vow (strictly understood, likely as a promise to God) was necessary for consecration before the Church, was to be assumed in said consecration, or was yet distinct from that consecration. See generally query no. 3 submitted to the Sacred Congregation for Divine Worship and reported at DOL, 1027, and e.g., KINISH, at p. 120: "Nor is the consecration [of virgins] to be confused even with the vow of virginity;" NOLDIN-SCHMITT, at p. 3: "Votum ad virginitatem non requiritur"; Fuchs, at 28: "*Votum*, ut patet, *non* pertinet ad essentiam virginitatis" (original emphasis); AND NOCENT, at p. 211: "The consecration [to virginity] must be distinguished from the vow of virginity." In light of the unsettled status of this question, the burden is on those who would necessarily apply concepts developed in service to the vow or virtue of virginity to show why they must also be accepted as criteria for admission to a life of consecrated virginity. Second, and of greater practical significance, too casual an extension of concepts associated with the virtue of virginity increases the possibility that disclosure of matters more proper to the internal forum (matters raised, say, in regard to the direction of consciences) might be asked of those seeking public admission to an order in the Church. Indeed, as we shall see, one of the modern criteria for determining a woman's eligibility to be admitted to consecration as a virgin was developed precisely to minimize potential invasions of conscience, not to provoke them. See fn. 67.

38 O'CONNOR, p. 17; GENICOT & SALSMAN, p. 200; WOUTERS, p. 16.

39 FORD & KELLY, vol. II, p. 211. Some authors even held that freely engaging in such acts as were *likely* to produce orgasm in a normal person could, even without that individual having experienced orgasm, deprive him or her of material virginity. See generally WOUTERS, pp. 16-17; NOLDIN-SCHMITT, p. 5; O'CONNOR, p. 19. Here a few words need be said about the difficulties occasioned by a test of virginity being related to female orgasm. Female orgasm, unlike male, does not result in external evidence of the event, at least not in unequivocal evidence of the event. While no male can reasonably be in doubt as to whether he experienced orgasm, women can be in reasonable doubt about their experience of orgasm, especially in their youth. To accept, therefore, personal experience of an event (indeed, the later *recollection* of a personal experience) as evidence of the event might make some sense in the realm of moral or pastoral theology, but to make it the test of a juridic fact (as is loss of virginity in certain contexts) is not good legal science.

vaso, the use of pornography, and so on, if engaged in and productive of orgasm, results in the loss of material virginity for that individual. On the other hand, actions not freely chosen (such as nocturnal emission, even if occurring in a partially awake state), or acts chosen but not in order to derive sexual pleasure therefrom (e.g., washing), even if pleasurable, were not held to be destructive of material virginity. If one experienced, however, a "completed" venereal act as understood above, one lost "material virginity".

Finally in regard to material virginity—setting aside a very few authors who regarded every loss of material virginity as canonically significant[40]—most authors agreed that the loss of material virginity impacted one's status as a virgin *only* in light of the conditions under which that material virginity was lost. Anticipating our discussion of formal virginity, briefly put, if material virginity was lost simultaneously with formal virginity (that is, as we shall see, by one's sufficiently consenting to the acts whereby material virginity was lost), then the loss of virginity itself was deemed "irreparable"; if, however, one did not consent to the acts whereby material virginity was lost, then the loss of material virginity was inconsequential to one's eligibility for recognition as a virgin.

3.2 — Formal virginity

Besides material virginity, a woman, to be considered a virgin, needs also to be possessed of formal virginity, that is, to have the firm resolution to avoid such actions as would result in the loss of material virginity.[41] It must be observed immediately that the failure of a material virgin to possess formal virginity was not necessarily sinful for the obvious reason that one need not intend to remain a virgin all of one's life. It is quite within the boundaries of good Christian conduct to be materially a virgin yet intend someday to marry and use marriage. Such intentions, of course, do not render one unchaste, but they do deprive one of formal virginity (even

[40] See, e.g., O'CONNOR, p. 25, and NOLDIN-SCHMITT, p. 4, discussing rape. One wonders whether Noldin-Schmitt's view that rape caused a woman to loss her virginity (albeit not *coram Deo*, to use his phrase) was based on an extreme value attached to the *sign* of virginity itself (an intact hymen) or whether he sought to avoid difficult inquiries into the circumstances of the act.

[41] It was disputed as to whether this resolve of virginity needed to be embraced specifically by a vow. See, e.g. WOUTERS, pp. 9-10, 15. The question need not detain us, for the reasons set out in fn. 37. Of course, this virginal intention must be motivated by love of the Lord for virginity to be reckoned Christian virginity of the sort eligible for consecration.

without any physical actions against material virginity).[42] Formal virginity could be sinfully lost, of course, by freely choosing to engage in such illicit acts as would forfeit material virginity or even by being, however briefly, willing to engage in such acts, even if they were not in fact performed. But, in distinction to material virginity (whose loss was always permanent, even if not always relevant) the loss of formal virginity was held by all authors always to be "reparable" upon a woman's asserting or reasserting the intention to remain a virgin. If the loss of formal virginity was not sinful (say, by a women's entertaining hopes for a time to marry and bear children), its reparation could be achieved by a resolution to commit to virginity itself.[43] If the loss of formal virginity was sinful (say, by desiring to engage in sexual intercourse prior to marriage or by engaging in various sexual acts short of intercourse), sacramental confession would be required in addition to renewed resolution to commit to virginity.[44] Either way, though, the loss of formal or intentional virginity is always reparable.

Bringing these two concepts together, if the loss of one's material virginity occurs under circumstances whereby formal virginity is also lost, the loss of virginity itself is irreparable.[45] A typical example of where this loss occurs licitly is upon the consummation of marriage between two hitherto chaste spouses. The act of sexual (specifically conjugal) intercourse is both willed and accomplished. Such persons are no longer virgins. Likewise, consensual sexual intercourse between two persons not married to each other is both objectively gravely sinful *and* destroys forever the virginity of each. Repentance from such a deed, while welcome and restorative of chastity,[46] does not restore virginity.

To be sure, a woman's after-the-fact realization that the loss of her condition as a virgin is, as it happens, irreparable, and that said loss carried certain ecclesiastical consequences unforeseen at the time of the loss, can provoke spiritual problems for the woman and pastoral challenges for her

[42] WOUTERS, p. 16.

[43] WOUTERS, p. 17.

[44] O'CONNOR, p. 18; CAPPELLO, p. 305; WOUTERS, p. 17.

[45] See, e.g., Palazzini citing the *locus classicus* of St. Jerome: "Let me flatly say that not even God, who can do all things, can restore virginity once it is destroyed" (Ep. 22 ad Eustochium, 5, my trans.) No pre-conciliar author held this kind of loss of virginity itself to be reparable. O'CONNOR, p. 19.

[46] Indeed, a repentant fornicator (or adulterer, or incestuist) could fruitfully undertake a vow of chastity, even of perpetual chastity, but not of virginity.

pastors and those around her.[47] Such problems need to be addressed,[48] of course, but they do not justify ignoring, in either the internal forum or the external, the well-settled implications of the loss of virginity.[49] To the extent that the current criteria for admission to a life of consecrated virginity *do*, in law and in fact, ignore these implications, they fail to serve the institution for which they were designed.

If, however, material virginity was lost under any other circumstances (the chief example being rape of a woman), nearly all writers held that virginity itself was not lost;[50] finally, if the loss of one's formal virginity occurred under any circumstances (licit or otherwise) it is always reparable by resolving for virginity again.[51]

At this point, we may return to our analysis of the problems with the first criterion for admission to consecrated virginity, though we remain within the scholion on the moral analysis of virginity.

3.3 — Further Problems with the First Criterion for Admission to Consecrated Virginity

A wide variety of gravely unchaste actions can be performed by women that nevertheless would not, by *any* accepted understanding of how virginity is lost (see above), result in the loss of (material) virginity. Unfortunately,

[47] See, e.g., Judith STEGMAN, "Virginal, feminine, spousal love for Christ" in *Ordo Virginum: The Restoration of the Ancient Order of Virgins in the Catholic Church, Volume One, An Introduction to the Vocation of Consecrated Virginity Lived in the World*, United States Association of Consecrated Virgins, 2012, pp. 95-126 [hereafter STEGMAN], esp. pp. 104-107.

[48] Some recent attempts (such as the concept of "secondary virginity" as noted by STEGMAN, at pp. 104-105) addressing the sense of loss and/or spiritual discouragement that some men and women experience upon the realization that they are no longer virgins in the eyes of the Lord seem praise-worthy in goal but confusing in terminology. I cannot address them further here.

[49] Consider this advice from NOLDIN-SCHMITT, at p. 5, to a confessor confronted with a question from a penitent as to whether he or she has lost virginity: "[O]rdinarie praestat hoc non aperte declarare, sed prudenter dissimulare e. g. dicendo omne peccatum per poenitentiam reparai posse, ne poenitens animum despondens atque afflictus curam conservandae castitatis negligat."

[50] CAPPELLO, p. 305; WOUTERS, p. 17. Some authors disputed that material virginity would even be lost thereby, but virtually all of these would hold such loss of material virginity to be inconsequential in regard to virginity itself.

[51] VERMEERSCH, p. 135, lists as common examples of such formal loss of virginity, an intention to enter typical marriage, internal sins against chastity, and external but incomplete sins against chastity.

the current first criterion for consecration prevents women who might have engaged in gravely unchaste conduct in the past (but who unquestionably preserved their material virginity), upon being moved to repentance and giving up their bad conduct and who now desire to consecrate themselves and their virginity (once gravely endangered but not actually lost, *Deo gratias*) to the Lord, from being considered for admission to the order of virgins. That is because the current admissions requirement deals, *by its own terms*, not with virginity but with chastity.[52] Again, chastity and virginity are not synonymous terms. But the problems with the novel language in criterion one go further yet.

A woman can, by a discreet act of copulation, unquestionably give up her virginity *without* ever living in what canon law would recognize as public or manifest violation of chastity (more on this point below). Thus, contrary to the unanimous expectation of the ecclesiastical tradition on virginity, but quite comfortably within the flawed current criteria of the Rite of Consecration, such a non-virgin woman qualifies for admittance to the order of virgins.[53] That, clearly, is a very serious problem. But, I fear, the problems with the current language of the first criterion go beyond excluding from consecration some traditionally eligible women or admitting some traditionally barred women. The very terms of this part of the first criterion, especially "public", "manifest", and "lived in a state", are ineptly, almost incoherently, chosen and can pressure ecclesiastical decision-makers into pastorally untenable positions.

First, the concepts of "public" and "manifest" are presented in the first criterion (by its use of Latin conjunction *seu*) as if they were virtually synonymous. But these two terms are not synonyms in canon law.

[52] This point bears re-emphasis: a repentant woman's illicit sexual conduct needs to be addressed forthrightly and accurately. If a hitherto unchaste woman has not, under correct moral or canonical analysis, lost her virginity, it is an injustice to imply otherwise to her or to reject her request for consecration as virgin on the grounds that she is not a virgin. See 1983 CIC 221 §1.

[53] Indeed KRUC at p. 43 makes precisely this proposal. He can hardly be criticized for doing so, because his proposal falls quite within the terms of this (poorly drafted) first criterion. We see now that it is not enough simply to *imply* that virginity is required by the first criterion, as suggested by Aitor JIMÉNEZ ECHABE, "Directorio marco del 'Orden de vírgenes' consagradas," in *Commentarium pro Religiosis*, 80 (1999) pp. 387-406 (also available in Italian in *Apollinaris*, 73 [2000], pp. 245-263), [hereafter JIMÉNEZ ECHABE], at p. 398. Virginity (as noted by KLIMISCH at 181), is of the essence of consecrated virginity. In an age that, on the one hand, does not understand or value virginity, and on the other hand which tries to supply novel ways of "restoring" lost virginity, *nothing* central to virginal consecration should be assumed, least of all, virginity itself.

The term "public" is used in many different ways in canon law,[54] and settling on just one interpretation of the word (especially in a context where it has not been used extensively, as is the case with questions of virginity), is difficult. Some canonical interpretations of the term "public" would apply to any act that is provable in the external forum, meaning that a single act observed by even one other person could qualify as "public". But, if that is the interpretation to be accorded the term "public" in the context of assessing (in)eligibility for consecration based on *unchastity*, then no woman who has performed even one seriously *unchaste* act (even if by no definition did she lose her *virginity* thereby) with another person could ever be admitted to the order of virgins![55] This seems a harsh result, but it falls within the letter of the first criterion for eligibility for virginal consecration as it currently stands.[56]

The word "manifest," too, has many uses in canon law,[57] but these uses tend, I suggest, to be associated with actions that are performed with

[54] See Xaverius OCHOA, *Index verborum ac locutionum Codicis iuris canonici* [1983], 2nd ed., Rome, Commentarium pro Religiosis, 1985, [hereafter, OCHOA], s.v. "Publice," wherein 11 appearances of the word "*publice*" in the 1983 Code are identified and scores of related uses of the word are noted.

[55] Between 2005 and 2007, then Archbishop Raymond Burke of St. Louis, in his capacity as Episcopal Moderator of the United States Association of Consecrated Virgins, and then Archbishop Albert Ranjith, in his capacity as Secretary of the Congregation for Divine Worship and Discipline of the Sacraments, were in communication concerning several points dealing with eligibility for virginal consecration. Among those points was the understanding to be accorded the word "public" (*publice*) in the first criterion for admission to consecration. Burke had set out the view that the word *publice* meant "public, namely committed with another person", and Ranjith expressed dicasterial agreement with Burke's interpretation. See generally STEGMANN, pp. 108-109. But the Burke-Ranjith exchange is, as we shall see shortly, highly conditioned by the context of the question posed.

[56] To be clear, this very strict interpretation of "*publice*" is supported in canon law, but it is not *demanded* thereby. Indeed, most other canonical appearances of the word "*publice*" denote actions that are not known only to a single witness, but are instead widely known in the community. Examples include one's: *publically* defecting from communion with the Church (c. 194), *publically* rejecting the Catholic faith (cc. 316, 694), *publically* professing hermitage (c. 603), *publically* assuming the obligation of celibacy (c. 1037), *publically* harming religion by broadcast speeches (c. 1369), and so on. Clearly, most uses of the word "*publice*" in canon law occur in regard to actions that are widely known in the community and factually indisputable, not to actions that are known to only by a single witness, let alone to actions that, as here (given the rite's confusing of "unchastity" with "loss of virginity") might not even qualify juridically as deflorational.

[57] OCHOA, s.v. "*Manifeste*", identifies two appearances of the word "*manifeste*" in the 1983 Code, namely, a restriction against taking declarations as infallible unless they "manifestly" such (c. 749) and restraint in executing sentences that are "manifestly" unjust (c. 1654), but some two dozen closely related words are used throughout the 1983 Code.

awareness of, and even an intention toward, their being perceived by the community. Thus, for example, a prostitute's dress, behavior, and conversation tend to 'manifest' her availability for sexual services, even if her unchaste acts are never observed by the community at large; likewise a woman's cohabitation with a man would 'manifest' her consent to sexual relations with him, again, even if those acts were not known by anyone other than the man. Thus the dissonance that arises from the first criterion's effectively (by its use of *seu*) equating "public" (if interpreted to mean a deed performed even one time with a single individual) and "manifest" (to the extent that it suggests chronic behavior intended or expected to be known by the wider community) is very great; that dissonance is aggravated when one recalls that the admittedly *unchaste* deed need not have been one that destroyed material *virginity*.[58]

In sum, literally nothing about the current first criterion for admission to virginal consecration addresses virginity itself;[59] instead, the first criterion only addresses, unevenly and inconsistently, some *circumstances* related to virginity. This novel language places formators and bishops in the anomalous position of having to inquire with women about not simply actions that should be provable without evidence from the woman herself (in that such actions are supposedly "public or manifest"), but worse, it pressures women to disclose past actions against chastity (*not* virginity) that one should be able to restrict to the confessional. What is particularly distressing about the language used in this first criterion is that it gratuitously preempts some reasonable and clear terminology developed by the Church precisely to evaluate a woman's eligibility for consecration to a life of virginity. It is to that language we may now turn.

[58] At the risk of wearying the reader, we must add that the phrase "lived in a state" is, canonically at least, a neologism that does not admit of clear application to fact patterns likely to be encountered in this regard today. It is not clear what the phrase "lived in a state" adds to the notion of "manifest", but surely it implies a considerably extended period of time engaged in an entire life style such as "the clerical state" or "the married state". Is there an "unchastity state"? At what point anyone has "lived a life" of almost anything except perhaps at the end of one's life? Such colloquial expressions have their place in pastoral exhortation, of course, but they are inadequate for guidance in disciplinary contexts.

[59] NOCENT, whose primary concerns for consecrated virginity are liturgical, of course, and not disciplinary, asserts at p. 218 that the current ritual "requires a formal and juridical virginity but not the physical virginity that the Pontifical of William Durandus seemed to demand." Nocent's assertion betrays considerable confusion regarding basic terminology in this area and is, in any case, plainly belied by the text of the current first admission criteria which never even mentions virginity and instead speaks only of chastity.

4 — *Virginity* in facie Ecclesiae

The complex analysis of virginity developed for use in moral theology (see scholion above) was recognized, of course, by bishops and canonists as sound and appropriate for use in regard to, for example, confessional practice or rendering advice to those living under vows of virginity. But that complex moral analysis was *not* used when the question before ecclesiastical officials was specifically whether a given woman was eligible for admission to the order of virgins.

When it came to assessing a woman's status as a "virgin" ecclesiastically, as would be necessary in regard to her formal pronouncement of or continued subjection to public vows of virginity or for her admission to the order of virgins, that is, when it was up to ecclesiastical authority to determine whether a woman was a virgin "from the Church's viewpoint" (*in facie Ecclesiae*), the issue became simple and precise. Having duly outlined the complex moral considerations that undergirded the theology of Christian virginity, Felix Cappello, with characteristic clarity, put the disciplinary matter thus: "Nevertheless from the Church's viewpoint a woman remains a virgin for so long as the seal of virginity has not been broken *by copulation*, and a man remains a virgin for so long as *he has not carnally known a woman*."[60] Rephrased in more modern terms, for ecclesiastical purposes in the external forum, a woman is considered a virgin as long as she has not engaged in (voluntary penal-vaginal) sexual intercourse.[61] But this simple point seems, I fear, to have been almost entirely overlooked by modern commentators on the disciplinary norms of consecrated virginity.

Cappello's interpretation was widely shared,[62] and several authors applied it to the consecration of virgins. For example, Fuchs wrote: "In law, in

[60] "Attamen in facie Ecclesiae mulier manet virgo, quamdiu claustrum virginitatis *per copulam* non fuerit violatum; et vir manet virgo, quamdiu *mulierem carnaliter non cognoverit*." CAPPELLO, at p. 305, original emphasis.

[61] This is, in fact, what the Burke-Ranjith correspondence effectively holds although it is easy to miss that crucial point. While the interpretation they accorded the word "*publice*" is narrow (albeit within the bounds of canonical usage), the context of their exchange was a woman who had unquestionably engaged in consensual sexual intercourse. Stegmann, 108. Such a woman is, beyond any question, no longer a virgin (even if only one other person knows that) and on *that* ground she would not, as Burke-Ranjith conclude, be eligible for consecration for virginity.

[62] See, e.g., PALAZZINI, at p. 678, wherein: "In facie Ecclesiae mulier virgo manet, quotiens copulam non admisserit, ac vir quousque mulierem non cognoverit." See also Thomas IORIO (Italian Jesuit, 1886-1966), *Theologia Moralis,* in 3 vols., 5th ed., D'Auria, 1960-1961, vol. III, pp. 598 at fn. 2, who quotes with approval the above passage from CAPPELLO,

regard to the consecration of virgins, women are generally considered virgins who have never consented to or experienced carnal copulation."[63] Similarly Vermeersch observed: "Every woman who has preserved the sign of virginity can be veiled, even though she might have indulged in solitarily libidinous actions: as far as the Church is concerned she remains a virgin. But in no wise is it permitted to veil a woman who has voluntarily engaged in sexual intercourse."[64] And Genicot & Salsmans stated: "The Roman Pontifical directs that [candidates for consecration as virgins] be interrogated only concerning life, awareness of the virtue, and 'body integrity', that is, the absence of copulation."[65]

Thus the criterion traditionally applied by the Church when called upon to determine a woman's eligibility to undertake a commitment centered on virginity looked simply and exclusively at virginity itself (and not at circumstances surrounding virginity), and asked of women only one question: have you ever had consensual sexual intercourse?[66] That single inquiry could be phrased in terms of "body integrity" (*carnis integritate*, as the pre-conciliar Roman Pontifical phrased it), but *in facie Ecclesiae* the question was always about sexual intercourse and never about anything else.[67]

MERKELBACH, p. 22, and NOLDIN-SCHMITT, p. 5. O'CONNOR, at pp. 24-26, does not hold that the Church allows this simpler question to be asked of women seeking to make a *vow* of virginity only, but he does hold it to apply to women who seek *consecration* as virgins.

63 "*In iure*, v. g. intuitu consecrationis virginum, virgines generatim habentur mulieres, quae numquam copulam carnalem admiserunt vel passae sunt." FUCHS, at p. 28 (original emphasis).

64 "Velari autem poterat omnis femina quae signaculum virginitatis retinuerat, quamvis solitarie libidini fortasse indulsisset: in facie Ecclesiae remansit virgo. Nullatenus autem velare licebat mulierem quae voluntarium concubitum admiserat." VERMEERSCH, at p. 136, n. 143.

65 "Pontificale Romanum [candidatas] interrogari iubet tantum de vita, virtutis conscientia et 'carnis integritate', scil. de absentia copulae." GENICOT & SALSMANS, vol. I, p. 200, n. 252. See also CAPPELLO, p. 303, and NABUCO, p. 447.

66 In light of the evident simplicity of this question about virginity, not to mention its centrality in cases of consecrated virginity, one may wonder at the apparent consternation of JIMÉNEZ ECHABE who, at p. 398, complains about the "eternal problem of physical virginity" (my trans.), a problem presumably occasioned under the former rite of consecration. But while one might have some sympathy for those who needed to parse the particulars of the moral tradition on virginity, those complexities were eliminated precisely *in facie Ecclesiae* and in their place remained only one question: has a candidate for consecrated virginity ever had consensual sexual intercourse? What was so onerous or complicated about that question?

67 I propose this conclusion notwithstanding that in one highly specific circumstance the question actually asked of certain women seeking consecration as virgins was in fact phrased in terms of marriage. The matter arose thus: Upon being granted permission to offer virginal consecration to professed religious, some cloistered communities realized that some of their members had, prior to entering religious life, lost their virginity. If these women did not

If the answer to the question concerning (consensual) sexual intercourse was Yes, then the woman was ineligible to undertake a commitment reserved to virgins; if the answer to that question was No, then the woman was eligible to undertake a commitment reserved to virgins. The matter could scarcely have been clearer. Unfortunately, it seems that the very narrow understanding of "public" (from the Burke-Ranjith exchange) is being applied to the overly broad category of "unchastity" (as set out in the current rite) to prevent women who engaged in occasional if serious acts against chastity (but *not* against virginity as understood *in facie Ecclesiae*) from later being consecrated as virgins even though in all other respects they are eligible for consecration and, under traditional criteria, they would have been accepted into the order of virgins.[68]

5 — *Reform and Use of the First Criterion for Determining Eligibility for Virginal Consecration*

Given the continuing confusion caused by using the same word "virginity" to describe a physical condition, a free choice, and a status in the Church, and considering that each of those terms is capable of various shades of meanings depending on circumstances, I think that, before anything else, a more precise vocabulary should be agreed upon to discuss this topic (these topics?) in the context of the Rite of Consecration to a Life of Virginity. I propose the following three expressions be used henceforth, stressing that this vocabulary applies only in regard to cases of *females* seeking *consecration as virgins*.

participate in the anticipated rite of consecration of virgins, aspersions would inevitably be cast on their character. To avoid placing such women in a position of disclosing their conscience, permission was granted to alter the traditional inquiry from that expressly dealing with "corporeal integrity" to one framed in terms of whether they had ever been married. See O'CONNOR, pp. 25-26. This 'marriage inquiry' was, in other words, an expedient approved for use under highly unusual conditions and solely in order to avoid causing an exposure of conscience. It was never intended, I suggest, as a general substitute for inquiry about (material) virginity among women seeking consecration as virgins.

[68] As reported in STEGMAN, at p. 109, the Burke-Ranjith exchange expressed concern that inquiries into a woman's past conduct might improperly violate her right to preserve the privacy of her conscience. But, I suggest, simply articulating a concern does not adequately address it. The problem here lies in the very text of the first criterion for consecration as a virgin, text that wrongly treats "chastity" and "virginity" as synonyms and which therefore provokes inquiries into a woman's record of chastity instead attending only to her status as virgin as the Church understands that fact in the specific context of the consecration of virgins.

Integrity of the body (*integritas carnis*), known elsewhere as material virginity, physical virginity, and so on, possessed by all people at one time and lost only upon, but always and forever upon, consensual engagement in licit or illicit (penal-vaginal) sexual intercourse.

Spousal commitment to Christ (*inhaerens Christo conjugi*), known elsewhere as formal virginity, virginal intent, or virginal commitment, and so on, a choice to enter spiritual marriage with Christ as one's only Spouse until death, lost upon revocation of that choice or by engaging in sexual activity or by ideation inconsistent with a spousal commitment to Christ.[69]

Christian virginity (*virginitas Christiana*) is the simultaneity of the two aspects above. Christian virginity (whatever else may done with it by way of, for example, public or private vows) is what may be consecrated by liturgical rite.

With these three terms—simple, clear, and most importantly, faithful to the tradition of virginity in the Church—in mind, we may now suggest a rephrasing of the first criterion for admission to virginal consecration.

The first criterion for admission to consecrated virginity deals essentially with *eligibility* for consecration and is based on a woman's past conduct. The centrality of virginity should be legally reasserted in the admission criteria for consecration as a virgin. Future literature and other information offered to women considering consecration as virgins should, for example, state plainly that a woman must be free of consensual (penal-vaginal) sexual intercourse, whether in marriage or outside of it, in order to be eligible for consecration as virginity. Consequent to an explanation of the terms, and leaving time for reflection and clarification as desired by the candidate,[70] a woman seeking consecration as a virgin should be asked whether she

[69] Of course, if this spousal commitment is never formed, or if it is revoked prior to consecration, that lack of commitment would bar admission to the order of virgins certainly for so long as such a lack were present. If, after admission, a consecrated virgin revoked or violated her spousal commitment to Christ, she would (in the objective order) sin gravely, but for reasons that go beyond the scope of this paper, she would not cease to be a consecrated virgin.

[70] The inquiry to be made by the bishop prior to consecrating women under the former rite (see fn. 13, 67) could be conducted the evening before, or even the morning of, the consecration itself. Of course it must be recalled that virginal consecration was restricted at that time to professed religious, indeed, typically, to cloistered religious. A consecrating prelate could therefore take more for granted in respect of those who were seeking consecration. Today one would expect more time for reflection to be made available.

possesses "integrity of the body" as set forth above.[71] If the answer to that question is Yes, then the candidate is eligible to be considered for admission to consecration. There is no need to ask in this respect whether she was married; marriage is irrelevant to one's status as virgin,[72] and the relevant question about virginity will have been asked directly as above.

The second criterion for admission to consecrated virginity deals essentially with one's ability to consecration to Christian virginity and looks to a woman's future conduct, specifically, to her resolve to live a life of virginal chastity. Textually, the second criterion needs only a slight clarification to serve this end. If the answer to the first criterion inquiry about possessing integrity of the body has been answered affirmatively, and a woman intends to live a chaste life, commitment to that kind of life necessary obviously entails resolve to preserve one's virginity.[73] Thus criterion two need be only be slightly modified to read "that by their age, prudence, and universally attested good character they give assurance of perseverance in a life of chastity *in virginity* dedicated to the service of the Church and of their neighbor" (emphasis added). Of course, a period of time spent in manifest unchastity—even assuming the candidate nevertheless possesses integrity of the body as explained above—would be grounds for careful attention and realistic evaluation of a woman's prospects for successful life as a consecrated virgin within the scope of criterion two, but not in regard to whether she was still a virgin (as presently but wrongly implied by criterion one).

Conclusion

By reasserting the centrality of *virginity* to the consecration of women as *virgins*, and by recovering and applying the criteria of virginity traditionally

[71] This phrasing is, it seems, very close to how the matter was phrased under the pre-conciliar Roman Pontifical: "Pontifex ad Missam se paret, in loco convenienti, praesentantur ei Virgines benedicendae; qui de earum aetate, et proposito singulariter singulas, videlicet, an annum vigesimum quintum compleverint, si voluntatem, et propositum servandae virginitatis habeant, diligenter inquirit; et insuper seorsum cum qualibet de vita, et conscientia, et carnis integritate." See also KINISH, p. 127.

[72] Of course if for other reasons one wished to determine whether a candidate for consecration were or ever had been married (say, to eliminate potential legal conflicts between the two states of life, or to prompt questions about the presence of natural or adopted children) such an inquiry could be done, but for its own reasons, and not as a circumlocutious inquiry about virginity itself.

[73] As CAPPELLO, at p. 306, put it, with a different point before him, "votum castitatis in virgine include[t] votum virginitatis, palam est."

used by the Church in matters of virginal consecration, several goods may be expected: canon and liturgical law on virginity would once again address virginity and not merely circumstances that might impact virginity; women who are not virgins would not be able to enter the order of virgins simply because they did not lose their virginity by a "public or manifest" act of sexual intercourse; women who, despite past unchaste acts, did not give up their virginity would be recognized as eligible for consecration; the canonical difficulties caused by trying to apply the divergent concepts of "public" and "manifest" to what are essentially matters of conscience would be eliminated; pastorally improper inquiries into a woman's past acts against chastity, as opposed to her status as virgin, would be prevented; and the special glory of Christian virginity would be more clearly manifested in a world that, perhaps more than ever before, needs the eschatological sign that modern women entering an ancient order in the Church uniquely give.

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SEPARATION OF SPOUSES *PROPRIA AUCTORITATE* AND THE NATURE OF ECCLESIASTICAL INTERVENTION

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SUMMARY — This demonstrates that a Catholic spouse is lawfully able to separate by his or her own authority (*propria auctoritate*) in the case of certain adultery without having to have any recourse to the ecclesiastical authorities. It begins with an historical introduction in which the history of the development of the juridic institute of separation of spouses is revealed. Separation *propria auctoritate* was certainly the practice in the early Church. However, as the Church gained jurisdiction over marriage, separation was deemed to be within the sole competence of the ecclesiastical authorities. Nevertheless, the practice of separation *propria auctoritate* remained and was even incorporated into the canonical doctrine in the case of adultery and danger of delay. After the Second Vatican Council, a pastoral approach to separation came to dominance which sought to eliminate the harsh and even penal character of separation. With the 1983 codification of canon law, this pastoral approach made the nature of separation *propria auctoritate* unclear. Through an analysis of the discussions of the coetus for the revision of the law, it can be demonstrated that the 1983 *CIC* did not substantially change the institute of separation. In fact, separation *propria auctoritate* in the case of adultery is a private juridic act which suspends the rights and obligations of marriage. Therefore, no ecclesiastical decree or sentence is required. Nevertheless, the 1983 *CIC* requires the permission of the diocesan bishop before the spouses can approach the civil forum for a divorce.

RÉSUMÉ — L'A. s'attache à démontrer qu'un époux catholique est légalement capable de se séparer de son conjoint ou de sa conjointe de sa propre autorité (*propria auctoritate*) et de s'adresser au forum civil pour obtenir un divorce sans devoir, pour cela, être tenu(e) de recourir de quelque façon que ce soit aux autorités ecclésiastiques. L'article commence par une introduction

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à l'évolution historique de l'institut juridique de la séparation des époux. La séparation des époux *propria auctoritate* se pratiquait assurément dans l'Église primitive. Ceci étant dit, au fur et à mesure que l'Église étendait sa juridiction au domaine matrimonial, on s'est mis à considérer que la séparation des époux relevait de la compétence exclusive des autorités ecclésiastiques. La pratique de la séparation *propria auctoritate* subsistait néanmoins au point, même, d'être incorporée à la doctrine canonique de l'adultère et du danger de retard. Après Vatican II, une certaine approche pastorale a commencé à s'affirmer. Elle témoignait d'un effort visant à éliminer le caractère dur, voire pénal, de la séparation. Avec la codification du droit canonique, en1983, cette approche pastorale a eu pour effet d'obscurcir la nature même de la séparation *propria auctoritate*. Une analyse des discussions du *coetus* chargé de la révision du droit permet de démontrer que le CIC de 1983 n'a pas substantiellement modifié l'institut de la séparation. En fait, la, séparation *propria auctoritate* en cas d'adultère constitue un acte juridique privé qui a pour effet de suspendre les droits et obligations du mariage. En conséquence, aucune sentence ou décret ecclésiastique n'est requis. Cependant, le CIC de 1983 CIC exige des époux qu'ils obtiennent la permission de l'évêque diocésain avant d'adresser une demande de divorce au forum civil.

Introduction

Christian marriage in the twenty-first century is an institution not fully comprehended by the contemporary culture. The indissolubility of marriage is a concept alien to the common supposition that marriage is freely entered into and, likewise, freely dissolved. Today, it is the common custom of Catholics in the Western world to approach the civil authorities for a decree of divorce when a marriage fails, without having had any recourse to the Church. However, such a custom is opposed to the traditional practice of the Church which requires spouses to approach the ecclesiastical authorities for a decree of separation. This leads to a question: Is a Catholic person ever permitted to approach the civil forum for a divorce, without having had any recourse to the ecclesiastical forum?

A few preliminary questions present themselves before the primary question can be answered. What is the nature of an act of separation by a spouse's own authority? What is the nature of ecclesiastical intervention in a separation of spouses case? Under what conditions is a Catholic allowed to approach the civil forum for a divorce? This paper attempts to answer these questions through an analysis of the Church's practice of allowing and regulating the separation of spouses vis-à-vis civil divorce. It begins with an historical introduction which seeks to uncover the complex history of 1) the

development of the juridic institute of separation of spouses, 2) the emergence of the Church's claims of sole jurisdiction over marriage, and 3) the source of the Church's prohibition of civil divorce by Catholics. Then, it attempts an analysis of the codified law in regards to the separation of spouses with careful attention to the possibility of separation by a spouse's own authority (*propria auctoritate*), beginning with the 1917 *CIC*, proceeding to the 1983 *CIC* and ending with the 1990 *CCEO*.

1 — *Historical Introduction*

Christianity was born into a cultural context which embraced divorce and remarriage. Divorce was a reality of life for the Jewish people, as well as for the Romans. Therefore, it is highly significant that, from the earliest available Christian texts, divorce and remarriage were rejected.

In Roman law, marriage and divorce were private affairs not highly regulated by the public law.[1] In the earliest centuries of the Church, there was no religious form required for marriage, so Christians married and, presumably, divorced like all other citizens of the Roman Empire.[2] Prior to Constantine, the secular laws did not give the Church any jurisdiction over marriage.[3] Roman law understood marriage to be created by the consent of the parties. However, the consent to be married had to endure, because "if at any time it ceased to exist by the will of one or of both of the parties, the marriage relationship was at an end. Marriage was freely entered, and just as freely terminated, for its permanence depended on the permanency of the *affectio*

[1] See E.A. FORBES, *The Canonical Separation of Consorts*: *An Historical Synopsis and Commentary on Canons 1128-1132*, Ottawa, University of Ottawa Press, 1948, p. 43 (=E.A. FORBES, *The Canonical Separation of Consorts*); see P.E. CORBETT, *The Roman Law of Marriage*, Oxford, Clarendon Press, 1930, p. 68 (=P.E. CORBETT, *The Roman Law of Marriage*).

[2] See T.P. DOYLE, "Marriage (cc. 1055-1165)," in *CLSA Comm1*, p. 737; see J. KAMAS, *The Separation of the Spouses with the Bond Remaining*: *Historical and Canonical Study with Pastoral Applications*, Rome, Editrice Pontificia Università Gregoriana, 1997, p. 35 (=J. KAMAS, *The Separation of the Spouses*); see P.E. HARRELL, *Divorce and Remarriage in the Early Church*: *A History of Divorce and Remarriage in the Ante-Nicene Church*, Austin, R.B. Sweet Company, 1967, p. 173-174 (=P.E. HARRELL, *Divorce and Remarriage*).

[3] See J.P. KING, *The Canonical Procedure in Separation Cases*: *A Historical Synopsis and Commentary*, Washington, DC, The Catholic University of America Press, 1952, p. 5 (=J.P. KING, *The Canonical Procedure*); see P.E. HARRELL, *Divorce and Remarriage*, p. 162.

maritalis, and not in contractual promises."[4] Divorce required no act by a public authority; it was merely required that one party announce his or her intention to divorce.[5] The same was more or less true in Jewish law.[6] Therefore, in both Jewish and Roman law, divorce was an intentional act of at least one spouse which had juridic effects.

Roman law did not recognize separation with the bond remaining to be a unique juridic status of the spouses.[7] If *affectio maritalis* remained, then the parties were married; if it had ceased, then the parties were divorced. Christian doctrine, however, did not recognize the legitimacy of divorce and only allowed for separation with the bond remaining. Nonetheless, when Christianity became influential in the Roman Empire, no drastic changes were seen in the divorce laws. Prior to Constantine, no reasons for divorce were required by Roman law. Under Constantine, the law adopted a list of reasons for which divorce was allowable, so effectively banning divorce in a number of instances.[8] However, these laws of Constantine were later abrogated. The emperor Justinian also attempted to restrict divorce, but these laws were also later abandoned. Consequently, despite showing some signs of Christian influence, the secular laws really did not correspond to Christian teaching.[9] This situation would not change for many centuries.

The Church's opposition to divorce was based upon several New Testament passages.[10] In accordance with these passages, the Church fathers allowed separation but not remarriage in the case of adultery.[11] According to

4 J.P. KING, *The Canonical Procedure*, p. 3; cf. E.A. FORBES, *The Canonical Separation of Consorts*, p. 48; cf. J. KAMAS, *The Separation of the Spouses*, p. 33.

5 Mere cessation of cohabitation was insufficient. There had to be an intentional act by one of the spouses. Cf. J. KAMAS, *The Separation of the Spouses*, p. 33. See also A. ARJAVA, *Women and Law in Late Antiquity*, Oxford, Clarendon Press, 1996, p. 177 (=A. ARJAVA, *Women and Law*); see also P.E. CORBETT, *The Roman Law of Marriage*, p. 225; see P.E. HARRELL, *Divorce and Remarriage*, pp. 172-173.

6 Cf. J. KAMAS, *The Separation of the Spouses*, p. 13; cf. R. PHILLIPS, *Putting Asunder: A History of Divorce in Western Society*, New York, Cambridge University Press, 1988, p. 19 (=R. PHILLIPS, *Putting Asunder*).

7 See E.A. FORBES, *The Canonical Separation of Consorts*, p. 49.

8 See R. PHILLIPS, *Putting Asunder*, p. 18; see A. ARJAVA, *Women and Law*, pp. 178-179.

9 Scholars are divided on how much Christianity influenced tougher divorce laws because, in fact, divorce and remarriage were always allowed. See A. ARJAVA, *Women and Law*, p. 183-191.

10 Cf. Mt 5:31-32; 19:3-9; Mk 10:2-12; Lk 16:18; I Cor 7:10-11; see also A. ARJAVA, *Women and Law*, p. 183.

11 Cf. Tertullian: PL 2, 940-943; Origen: PG 13, 1246; Ambrose: PL 14, 431; PL 15, 1767; Augustine: PL 40, 483-484; John Chrysostom: PG 51, 225; Van De Wiel states that the writings of the Church fathers "formed an authoritative source of canon law, but not a

the fathers, adultery was clearly stated in scripture as a reason for separation, but they were not certain whether there were other grounds for separation. The practice of allowing separation without severing the bond of marriage developed over time.[12]

By the fifth century Christians were beginning to see marriage as a matter belonging to the jurisdiction of the Church. Kamas states, "[…] more and more [the Church] understood marriage as a religious affair, which belongs to the competence of the bishop rather than to the jurisdiction of the civil authority."[13] As the Church became more aware of its jurisdiction over marriage, it began to legislate about marriage matters in local synods and councils.[14]

The fall of the Roman Empire did not bring significant changes to the availability of divorce among the various Germanic kingdoms. However, the Church did become bolder in its assertion of jurisdiction over marriage and especially separation of spouses. Canon 25 of the Council of Agde required spouses to submit to the judgment of the provincial bishops before separating. The canon stated: "If they abandon their wives prior to stating a reason for separation before the provincial bishops and before receiving a judgment, let them be excluded from the communion of the Church and from the holy group of people in it, because they are staining the faith and their marriages."[15] Thus, excommunication was the penalty for not submitting to the jurisdiction of the Church. Moreover, this canon does not differentiate adultery from other causes, and so seems to have applied in all situations.

Despite the legislation of certain local councils, as the centuries progressed the battle between Church teaching and permissive divorce laws seemed to wear down the Church's resolve.[16] In time, it seemed almost

constitutive or legislative source" (C. VAN DE WIEL, *History of Canon Law*, Louvain, Peeters Press, 1991, p. 21).

12 See E.A. FORBES, *The Canonical Separation of Consorts*, p. 245; cf. P.E. HARRELL, *Divorce and Remarriage*, p. 175; pp. 209-210; p. 226.

13 J. KAMAS, *The Separation of the Spouses*, p. 54.

14 In this regard, cf. the Council of Elvira, c. 8; Pope Innocent I (PL, 20, 500-501); Pope Leo I (PL, 54, 1137); the Eleventh Council of Carthage, c. 8; the Council of Adge, c. 25; the First Council of Arles, c. 24; the Council of Angers, c. 6; the Council of Vannes, c. 2.

15 "[…] *si ante, quam apud episcopos conprovinciales discidii causas dixerint, et prius, quam iudicio dampnentur, uxores suas abiecerint, a conmunione ecclesiae et sancto populi cetu pro eo, quod fidem et coniugia maculant, excludantur*" (Canon 25 of the Council of Agde, in C. 33, q. 2, c. 1).

16 Without the backing and support of the secular laws and rulers, the ecclesiastical discipline could not be enforced. Cf. J. MCNAMARA and S.F. WEMPLE, "Marriage and Divorce in the

inevitable that ecclesiastical practice would collapse under the pressure of secular laws and local customs, much as had happen in the East. However, the rise of the Carolingian dynasty would redirect the flow of history in the Western Church.

The Carolingian dynasty had a decidedly "religious aspect of their governance."[17] Pepin, the first of the Carolingian kings, "demonstrated an altogether unprecedented desire to abolish most secular causes for divorce."[18] He worked to bring the secular laws in line with ecclesiastical laws. Pepin's son, Charlemagne, continued his father's efforts and even intensified them. Besides changing the secular laws, Charlemagne "provided for their enforcement throughout his vast realm."[19] So, now for the first time, the secular laws came into line with Church doctrine. As the years progressed, local synods and secular rulers worked hand in hand to produce unified legislation, but the secular rulers were not willing to completely give jurisdiction of marriage to the Church. This created a situation of shared jurisdiction which caused "considerable confusion even in the minds of the bishops as to the competence of ecclesiastical courts."[20] Still, over time jurisdiction of marriage was transferred completely to the Church.

By the time of Gratian, the jurisdiction of the Church was firmly established. Cases of separation of spouses had to be deferred to the ecclesiastical courts. Gratian included in his *Decretum* canon 25 of the Council of Agde, quoted above.[21] Moreover, Gratian said in one *dictum*, "However, because a separation itself is a penalty, and a penalty must not be imposed except through a judge, generally it must be understood that whether for a cause or for no cause, it is not lawful for anyone to dismiss his wife by his own authority."[22] Thus, from the inclusion of this canon and *dictum*, scholars

Frankish Kingdom," in S. MOSHER STUARD (ed.), *Women in Medieval Society*, Philadelphia, University of Pennsylvania Press, 1976, p. 100 (=J. MCNAMARA, "Marriage and Divorce"). Also, the penitentials are an example of the Church's shift in another direction. The penitentials seemed to embody the belief that the Church must come to grips with the reality of divorce and remarriage. Cf. E.A. FORBES, *The Canonical Separation of Consorts*, pp. 69-73; cf. J. KAMAS, *The Separation of the Spouses*, pp. 72-74.

17 J. MCNAMARA, "Marriage and Divorce," p. 101.

18 *Ibid*., p. 102.

19 *Ibid*., p. 102.

20 J. MCNAMARA, "Marriage and Divorce," p. 106.

21 Cf. C. 33, q. 2, c. 1; however, Gratian mistakenly attributed this canon to the Council of Carthage.

22 "[…] *tamen quia ipsa separatio pena est, et pena nulli est inferenda nisi per iudicem, generaliter hoc intelligendum est, ut sive ob causam permissam, sive nulla causa existente, non liceat alicui sua auctoritate uxorem dimittere*" C. 33, q. 2, c. 4.

conclude that Gratian did not allow for separation by one's own authority.[23] However, in the *glossa ordinaria* of the Roman edition of the *Corpus iuris canonici*, the glossator stated that separation by one's own authority is not allowed *except* in three cases: adultery committed publicly, cruelty, and consanguinity to a degree which cannot be dispensed.[24] So, separation *propria auctoritate* was not entirely unknown.

Gratian demonstrated that the decrees of local councils and the decretals of various popes affirmed the traditional teaching that separation was allowed in the case of adultery. Yet, there was no clear doctrine about other causes of separation. After Gratian, however, the Decretals of Pope Gregory IX developed the doctrine that separation could be granted for reasons other than adultery.[25] Moreover, in at least two places in the Decretals, separation *propria auctoritate* seems to have been operative. In the first instance, a knight separated from his wife because of her notorious adultery.[26] The text says that the knight was excommunicated for taking this action. Nevertheless, the pope stated that the woman should not be forced to return to the knight. Therefore, it seems that the separation was accorded juridic effects. The other instance is one of a woman who left her husband by her own authority because he lapsed into heresy.[27] This case, however, does not mention any penalty against the woman for taking such an action. Consequently, commentators on the Decretals debated whether separation *propria auctoritate* was permissible.[28] As the centuries progressed, it began to be established that separation by one's own authority *propria auctoritate* was allowed in at least two situations, notorious adultery and heresy.

Thus, the juridic institute of separation of spouses, as it had developed through Gratian and the Decretals of Pope Gregory IX, was much different than the permissive divorce laws of the Roman and early Germanic peoples. Separation was a strict fault-based system, which was allowed only for adultery and a few other causes. Separation was seen as a penalty, which could only be imposed by an ecclesiastical authority. However, as an exception,

[23] Cf. E.A. FORBES, *The Canonical Separation of Consorts*, p. 86; cf. J.P. KING, *The Canonical Procedure*, p. 22; cf. J. KAMAS, *The Separation of the Spouses*, p. 97.

[24] See *Corpus iuris canonici emendatum et notis illustratum Gregorii XIII Pontificis Maximi iussu editum*, Rome, 1582, col. 2168. Cf. J.P. KING, *The Canonical Procedure*, p. 23.

[25] Cf. X, 4, 19, c. 2; X, 4, 19, c. 6; cf. E.A. FORBES, *The Canonical Separation of Consorts*, p. 91; cf. J. KAMAS, *The Separation of the Spouses*, p. 110.

[26] See X, 4, 19, c. 4; cf. E.A. FORBES, *The Canonical Separation of Consorts*, p. 90; cf. ibid., p. 98; cf. J.P. KING, *The Canonical Procedure*, p. 25; cf. J. KAMAS, *The Separation of the Spouses*, pp. 104-105.

[27] See X, 4, 19, c. 6.

[28] See E.A. FORBES, *The Canonical Separation of Consorts*, p. 97.

separation *propria auctoritate* was allowed for notorious adultery and heresy. In general, separation on one's own authority was subject to excommunication, and the spouses could be forced to resume common life. Forbes noted, "Once the doctrine of the Church on separation of consorts had become solidified in the Decree of Gratian and in the Decretals of Pope Gregory IX, it underwent few modifications during the ensuing centuries."[29] With the development of this juridic institute, the jurisdiction of the Church over marriage was fortified, but this jurisdiction was soon to be attacked by a powerful new movement.

The Protestant Reformation began in 1517 when Martin Luther posted his ninety-five theses to the church door in Wittenberg. Luther and the other reformers attacked the Catholic understanding of the sacraments, including marriage. The reformers rejected the doctrine of the indissolubility of marriage and advocated for the possibility of divorce. Moreover, the reformers attacked the idea that the Church enjoys sole jurisdiction over marriage. It was not long before princes began aligning their political ambitions with the spiritual agenda of the reformers. Thus, entire geographical circumscriptions became officially Protestant. This had an impact on the secular laws within these territories. Phillips states, "[…] from the sixteenth century onwards the acceptability of divorce underwent a renaissance as a result of the Protestant Reformation. […] The Reformers incorporated divorce into their marriage doctrines, and under their aegis all of the Protestant states of continental Europe and Scandinavia had legalized divorce by the end of the sixteenth century."[30] Unlike the juridic institute of separation, these new laws allowed for the dissolution of the bond of marriage for certain reasons, primarily adultery and desertion. However, the Protestant reformers and the ensuing legislation did not completely do away with the institute of separation. In fact, in some locations separation with the bond remaining was maintained and could be obtained for less serious reasons than adultery or desertion.[31] Indeed, even though the Reformers allowed for divorce in certain circumstances, in actual practice divorce was difficult to obtain.[32]

Luther also held that the decision to separate is completely within the innocent spouse's own authority, and any disputes about the right to separate should be decided by the civil authorities. Calvin, however, thought that divorce and remarriage should be regulated by "a legal order that is in

[29] E.A. FORBES, *The Canonical Separation of Consorts*, p. 103.

[30] R. PHILLIPS, *Putting Asunder*, p. 40.

[31] See *ibid*., p. 65.

[32] Phillips cites as an example that the Reformers generally suggested polygamy as a solution for the English King Henry VIII rather than the divorce of his wife. See *ibid*., pp. 75-76.

accordance with the teaching of the New Testament."[33] Therefore, in the reformation territories, the jurisdiction of the Catholic Church over marriage was lost and this power was transferred to the secular authorities.

The Council of Trent was convened in order to combat the spread of Protestantism. The twenty-fourth session of the Council reaffirmed the traditional doctrine of the indissolubility of marriage. Canon 8 of this session declared that the separation of spouses can take place for many reasons, either for a determined or indeterminate period of time.[34] Moreover, canon twelve of the same anathemized anyone who rejected the jurisdiction of the Church over marriage.[35] This was the first time that there was any official declaration of the Church's jurisdiction over marriage. Prior to this, the jurisdiction had accrued to the Church primarily through customary law.[36] So, the Council of Trent clearly established the doctrine of the Decretals that separation was possible for reasons other than adultery, and it boldly proclaimed the Church's jurisdiction over marriage.

The Council of Trent did not indicate whether separation *propria auctoritate* was possible, but after the Council the canonical doctrine on this matter was further consolidated. Authors argued that separation *propria auctoritate* was allowed not only because of certain adultery, but also for lesser causes if there was danger in delay.[37] Moreover, separation effected *propria auctoritate* because of danger of delay required further ecclesiastical intervention, whereas separation because of notorious adultery required no such intervention.[38]

Despite its efforts, the Council of Trent was not able to turn the tide of the new civil divorce laws, although civil divorce at this time was still fairly rare and difficult to obtain. This situation changed, however, with the French revolution. The French Revolution liberalized many laws, including divorce laws and, in the decades following, much of the world adopted similar laws.

In response to these more permissive laws, the Church's efforts grew stronger. By this point the Church's opposition to the civil authorities was

[33] J. KAMAS, *The Separation of the Spouses*, p. 123.

[34] See COUNCIL OF TRENT, Canons on the Sacrament of Marriage, 11 November 1563, c. 8, in H. DENZINGER, *Compendium of Creeds, Definitions, and Declarations on Matters of Faith and Morals*, P. HÜNERMANN, R. FASTIGGI AND A. ENGLUND NASH (eds.), bilingual edition from the 43rd ed., San Francisco, Ignatius Press, 2012, p. 427.

[35] See *ibid*., c. 12, p. 427. Implicit in this canon is the notion that Catholics are not free to approach the civil forum for a separation. See J. KAMAS, *The Separation of the Spouses*, p. 130.

[36] Cf. J.P. KING, *The Canonical Procedure*, p. 16.

[37] See *ibid*., p. 54.

[38] See *ibid*., pp. 55-56.

rooted in the fight to uphold the indissolubility of marriage.[39] Many civil authorities could not comprehend a separation which left the bond intact. Consequently, the Church had no option but to oppose their jurisdiction.

Due to the practical problems caused by the modern states not accepting ecclesiastical separations, many Catholics wanted permission to approach the civil forum for a divorce. The Sacred Congregation of the Council allowed parties separated by an ecclesiastical decree to bring property disputes before the civil forum. Kamas notes, "There is an explicit acknowledgment of the congregation that the custom of involving civil authorities regarding civil effects is not contrary to the canonical norms."[40] However, as divorce became more common, civil laws began to require a civil divorce in certain situations if the civil effects were to be recognized. Thus, in the nineteenth century, a number of bishops from France and Belgium questioned the Holy See whether or not certain persons could be allowed to approach the civil authorities for a divorce. J.P. Kelly noted that in each case the party requesting permission to approach the civil forum "had already been granted a permanent separation […and] the Catholic petitioner had solemnly promised that he would never attempt another union while his true spouse still lived. In all these cases the reason given for seeking the permission was the protection of the civil rights of the Catholic."[41] Nevertheless, prior to 1906, all of the responses from the Holy See were negative, that is to say, the request to approach the civil forum was denied.

In response to the increased desire for civil divorce, the Church in the United States in the late nineteenth century enacted particular laws penalizing Catholics who sought a divorce. In 1866, the Second Plenary Council of Baltimore encouraged bishops to create particular law for each diocese according to which divorced and remarried Catholics would be penalized with excommunication.[42] Then, in 1886, the Third Plenary Council of Baltimore imposed an automatic excommunication on those who obtained a civil

[39] Cf. PIUS IX, Syllabus of Errors *Syllabus complectens praecipuos*, 8 December 1864, no. 67, in *ASS*, 3 (1867), pp. 168-176, English translation in *Dogmatic Canons and Decrees*, Rockford, Tan Books and Publishers Inc., 1977, p. 204; cf. LEO XIII, encyclical letter on Christian marriage *Arcanum divinae sapientiae*, 10 February 1880, in, *ASS,* 12 (1879), pp. 385-402, English translation in C. CARLEN (ed.), *The Papal Encyclicals: 1878-1903*, New York, McGrath Publishing Company, 1981, pp. 29-40.

[40] J. KAMAS, *The Separation of the Spouses*, p. 145.

[41] J.P. KELLY, "Separation and Civil Divorce," in *The Jurist*, 6 (1946), p. 221 (=J.P. KELLY, "Separation and Civil Divorce").

[42] See G.P. FOGARTY, "The Historical Origin of the Excommunication of Divorced and Remarried Catholics Imposed by the Third Plenary Council of Baltimore," in *The Jurist*, 38 (1978), p. 427 (=G.P. FOGARTY, "The Historical Origin").

divorce and afterwards attempted to contract a new marriage.[43] Likewise, the Council criminalized the mere obtaining of a civil divorce, apart from the question of remarriage, by legislating a penalty to be imposed by the local bishop.[44] So, on the eve of the first codification of canon law, the Church was engaged in a fierce battle against the usurpation of its jurisdiction by the civil authorities and the growing problem of Catholics wanting a civil divorce.

2 — *The Codified Law on the Separation of Spouses*

With the codification of canon law in the twentieth century, the juridic institute of the separation of spouses was enshrined in the codified law. This codification consolidated the juridic history of the institute from the *Decretum* of Gratian, the law of the Decretals, the pronouncements of the Council of Trent and the praxis of the Roman curia after the Council. Therefore, there is considerable continuity between the juridic institute as it was expressed in the *Corpus Iuris Canonici* and that of the *Codex Iuris Canonici*. Thus, an analysis of the codes is not a departure from the canonical tradition, but a continuation of it. It is to this analysis that we now turn.

2.1 — Overview of the Canons on Separation of Spouses

At the start of this analysis, it is appropriate to begin with a global overview of the canons on the separation of spouses. The codified law of the Church has grouped the canons on separation of spouses in a chapter entitled,

[43] See THIRD PLENARY COUNCIL OF BALTIMORE, *Acta et decreta*, Baltimore, Typis Joannis Murphy et Sociorum, 1886, no. 124, pp. 63-64.

[44] See THIRD PLENARY COUNCIL OF BALTIMORE, *Acta et decreta*, Baltimore, Typis Joannis Murphy et Sociorum, 1886, no. 126, pp. 64-65; Fogarty argues that the Third Plenary Council of Baltimore was not dealing directly with the problem of Catholics approaching the civil forum for divorce, but rather the problem of implementing the decree *Tametsi*. In the United States, at that time, the small number of priests made canonical form difficult to observe. Thus, many Catholics would enter into civil marriages and avail themselves of civil divorce when the relationship ended. Fogarty states, "[…] the bishops were concerned with preserving the sacramentality of marriage and its ecclesial dimensions in a far-flung missionary country with a heterogeneous population. The excommunication seems to have been their way of attaining that goal" (G.P. FOGARTY, "The Historical Origin," p. 433). So, Fogarty argues, the imposition of excommunication was a way of preserving the dignity of those marriages which were entered into by Catholics before a civil official or Protestant minister.

"*De separatione coniugum.*"[45] This chapter is further divided into two articles or sections. The first article deals with the dissolution of the bond, which includes dissolution of a non-consummated sacramental marriage, the Pauline privilege, and dissolution in favor of the faith.[46] The canonical tradition calls dissolution of marriage perfect or full separation.[47] The second article deals with the separation of spouses, which the canonical tradition calls imperfect or less than full separation.[48] Thus, both dissolution of marriage and separation of spouses are closely related insofar as both divide the spouses, however, the latter keeps the bond of marriage intact.

With the exception of the Eastern Code, the article on separation of spouses with the bond remaining begins with an obligation to maintain cohabitation.[49] The next canon deals with separation in the case of adultery.[50] As we have already seen, the canonical tradition has firmly established that adultery is a reason for granting a separation. So, adultery is treated in its own canon apart from the other causes.[51] The canons all state that, in the case of adultery, the innocent spouse has the right (*ius*) of separation unless he or she has condoned the adultery.[52] The second paragraph of

[45] Cf. *CIC*/17 cc. 1118-1132; *CIC*/83 cc. 1141-1155; *CCEO* cc. 853-866. Due to the unique structure of the Eastern Code, "*De separatione coniugum*" is the title of *article* 8 within the *chapter* on marriage, whereas in the Latin codes, "*De separatione coniugum*" is a *chapter* within the *title* on marriage.

[46] For the canons on dissolution, see *CIC*/17 cc. 1118-1127; *CIC*/83 cc. 1141-1150; *CCEO* cc. 853-862.

[47] Cf. F.M. CAPPELLO, *Tractatus canonico-moralis de sacramentis*, 5th ed., vol. 5, *De matrimonio*, Rome, Marietti, 1961, p. 757 (=F.M. CAPPELLO, *Tractatus*); cf. F.X. WERNZ, *Ius canonicum*, vol. 5, *Ius matrimoniale*, Rome, Pontificia Universitas Gregoriana, 1946, pp. 782-784 (=F.X. WERNZ, *Ius canonicum*).

[48] Cf. F.M. CAPPELLO, *Tractatus*, p. 757; cf. F.X. WERNZ, *Ius canonicum*, pp. 782-784. "Authors call this kind of separation by many names: *divortium semi-plenum, divortium minus plenum, divortium imperfectum* […] ecclesiastical divorce, limited divorce, etc. Modern authors usually term it simply *separatio* […]. Pre-Code authors generally termed it *divortium*" (E.A. FORBES, *The Canonical Separation of Consorts*, p. 139).

[49] Cf. *CIC*/17 c. 1128 and *CIC*/83 c. 1151.

[50] Cf. *CIC*/17 c. 1129, *CIC*/83 c. 1152 and *CCEO* c. 863.

[51] Commentators regularly equated heresy with adultery insofar as the juridic effects of separation are concerned. This is in accord with canonical tradition going back to the Decretals. Cf. P. GASPARRI, *Tractatus*, p. 246; F.X. WERNZ, *Ius canonicum*, p. 844; cf. S. WOYWOD, *A Practical Commentary*, p. 818.

[52] Cf. *CIC*/17 c. 1129 §1, *CIC*/83 c. 1152 §1 and *CCEO* c. 863 §1. In addition to condonation, the 1917 Code lists several other reasons which deprive the innocent party of the right of separation. For a good treatment of the requirements which the adultery must have in order to give rise to the right to separate, and for the circumstances which deprive the innocent spouse of this right, cf. P. GASPARRI, *Tractatus canonicus de matrimonio*, vol. 2, Vatican City, Typis polyglottis Vaticanis, 1932, pp. 243-245 (=P. GASPARRI, *Tractatus*).

this canon goes on to define the condonation of adultery.[53] Immediately after the paragraph defining condonation of adultery, the canons expressly mention the possibility of separation by the innocent spouse's own authority (*propria auctoritate*).[54] The 1917 *CIC* explicitly states that separation *propria auctoritate* can occur, whereas the 1983 *CIC* as well as the *CCEO* imply separation *propria auctoritate* using different language. However, the canons do not clarify the nature of separation *propria auctoritate*. The following analysis will attempt to clarify this nature.

After separation due to adultery, the canons move on to consider separation for other causes.[55] As we have seen, the Decretals allowed for separation for other causes, and the canonical tradition recognized various reasons for separation, especially after the Council of Trent. The canonical doctrine distinguished between perpetual separation and temporary separation. It was generally understood that separation for causes other than adultery was merely temporary, for as long as the cause endured, whereas adultery gave rise to the right for a perpetual separation.[56] Moreover, if there is danger in delay, then the canons allow the other party to separate *propria auctoritate*. Like the canons on separation due to adultery, these canons on temporary separation do not clarify the nature of separation *propria auctoritate*.

Finally, the article or section of the codes on separation of spouses with the bond remaining ends with some norms on the effects of separation. The 1917 *CIC*, 1983 *CIC* and the *CCEO* all include a canon regarding the upbringing of children after a separation has occurred.[57] The two modern codes also contain a norm that if the innocent spouse readmits the guilty one, then he or she renounces the right to separate.[58] Lastly, the 1917 CIC did not contain any procedural norms for the separation of spouses, whereas the two modern codes do provide such norms.[59]

Thus, certain questions still remain, namely, about the nature of separation *propria auctoritate* and the nature of ecclesiastical intervention in such cases. Moreover, it must be determined when and under what circumstances spouses are allowed to approach the civil forum. The following analysis will attempt to answer these questions.

[53] Cf. *CIC*/17 c. 1129 §2, *CIC*/83 c. 1152 §2 and *CCEO* c. 863 §2.
[54] Cf. *CIC*/17 c. 1130, *CIC*/83 c. 1152 §3 and *CCEO* c. 863 §3.
[55] Cf. *CIC*/17 c. 1131, *CIC*/83 c. 1153 and *CCEO* c. 864.
[56] For example, cf. F.M. CAPPELLO, *Tractatus*, pp. 759-764.
[57] Cf. *CIC*/17 c. 1132, *CIC*/83 c. 1154 and *CCEO* c. 865.
[58] See *CIC*/83 c. 1155 and *CCEO* c. 866.
[59] Cf. *CIC*/83 cc. 1692-1696 and *CCEO* cc. 1378-1382.

2.2 — The 1917 Codex *Iuris Canonici*

The article of the 1917 *CIC* on the separation of spouses begins with a canon on cohabitation. Canon 1128 of the 1917 *CIC* states, "Spouses must preserve the communion of conjugal life, unless a just cause excuses them."[60] The canonical tradition had identified the communion of conjugal life to be a communion of bed, table and dwelling-place.[61] Separation interrupts this communion in its threefold nature. However, commentators on the 1917 *CIC* viewed separation merely in terms of a cessation of cohabitation.[62] Even though cohabitation does not pertain to the essence of marriage, it is so closely connected to marriage that the Church has determined this to be solely a matter for her own jurisdiction.[63] J.P. Kelly stated:

> It is on this principal issue that the Church has sole and exclusive jurisdiction to pass judgment when at least one of the parties to the marriage is baptized. Therefore, only after the Church has passed judgment on this principal issue and declared that a just cause is present for separation *a mensa et toro manente vinculo*, can the State be said to have any jurisdiction with regard to the incidental question of support and financial settlement.[64]

Therefore, any civil jurisdiction attempting to decide cases of separation of spouses was seen as an infringement of the Church's rights.[65] The assertion of the Church's sole and exclusive jurisdiction in determining the suspension of cohabitation is somewhat mitigated by the fact that the Code does not contain a precept forbidding Catholics to approach the civil forum.[66]

[60] *Codex iuris canonici Pii X Pontificis Maximi iussu digestus Benedicti Papae XV auctoritate promulgatus*, Typis polyglottis Vaticanis, 1917, English translation E.N. Peters (ed.), *The 1917 Pio-Benedictine Code of Canon Law*, San Francisco, Ignatius Press, 2001, c. 1128 (=*CIC*/17). This translation is used in all subsequent citations of the canons of the 1917 Code.

[61] Cf. H.A. AYRINHAC, *Marriage Legislation in the New Code of Canon Law*, revised and enlarged by P.J. LYDON, New York, Benziger Brothers, 1939, p. 328 (=H.A. AYRINHAC, *Marriage Legislation*); cf. BOUSCAREN, T.L., A.C. ELLIS, and F.N. KORTH, *Canon Law: A Text and Commentary*, 4th ed., Milwaukee, The Bruce Publishing Company, 1966, p. 635 (=T.L. BOUSCAREN, *Canon Law*); cf. F.X. WERNZ, *Ius canonicum*, pp. 782-783.

[62] Cf F.M. CAPPELLO, *Tractatus*, pp. 757-758; cf. E.A. FORBES, *The Canonical Separation of Consorts*, pp. 130-137.

[63] Commentators have long stated that cohabitation "does not pertain to the essence of marriage, but only to its integrity" (F.M. CAPPELLO, *Tractatus*, p. 757).

[64] J.P. KELLY, "Separation and Civil Divorce," p. 192; cf. CIC/17 c. 1960.

[65] According to Forbes, the only time a Catholic can licitly approach the civil authority for separation is if there is a Concordat between the Holy See and the secular state (see E.A. FORBES, *The Canonical Separation of Consorts*, p. 203). See also H.A. AYRINHAC, *Marriage Legislation*, p. 335.

[66] J.P. KELLY, "Separation and Civil Divorce," p. 218.

Nevertheless, the prohibition is at least implicit in canons 1960 and 1128-1132, and the commentators all agreed to its existence, at least in certain circumstances.[67]

Related to the question of jurisdiction is the question of who has the authority to effect a legitimate separation of spouses. In accord with canonical tradition, the 1917 *CIC* maintained the discipline of recognizing two authorities who can effect a legitimate separation between the baptized. First and foremost, the competent authority was the ecclesiastical authority. The ecclesiastical authority was able to effect a separation because of the public nature of marriage and the Church's innate jurisdiction over marriage. Moreover, the 1917 *CIC* maintained the tradition, which began with Gratian, of viewing the separation of the spouses as a penalty against the guilty spouse.[68] Therefore, only the ecclesiastical authority was competent to impose the penalty of separation. These justifications for the Church's authority to effect a separation, would seem to exclude the possibility of separation *propria auctoritate*. However, the 1917 *CIC* recognized the authority of the spouses themselves to effect a legitimate separation, but only in certain circumstances.[69] Separation *propria auctoritate* was able to happen either with mutual agreement or unilaterally.[70] Separation by mutual agreement was not treated by the 1917 *CIC*, but it was assumed to be legitimate as long as it was temporary and for a just cause.[71]

Unilateral separation *propria auctoritate* was foreseen by the Code and allowed in two situations. The first situation was adultery. Canon 1129 §1

[67] Cf. H.A. AYRINHAC, *Marriage Legislation*, p. 335; cf. T.L. BOUSCAREN, *Canon Law*, p. 638; cf. F.M. CAPPELLO, *Tractatus*, pp. 767-777; cf. P.M. CORONATA, *Institutiones iuris canonici ad usum utriusque cleri et scholarum*: *De sacramentis*, vol. 3, *De matrimonio et de sacramentalibus*, Rome, Marietti, 1945, p. 986 (=P.M. CORONATA, *Institutiones*).

[68] Cf. J. KAMAS, *The Separation of the Spouses*, pp. 161-162: "The punitive nature of the separation canons is manifested in the very terms used by the Code. Such words as *crime*, *innocent spouse* are indicative of their penal overtones. The separation was viewed as a penalty for the guilty person, or at least as a medicinal means of stopping undesirable behavior."

[69] Cf. J.P. KELLY, "Separation and Civil Divorce," p. 194; cf. E.A. FORBES, *The Canonical Separation of Consorts*, pp. 137-138; cf. P. GASPARRI, *Tractatus*, p. 246; cf. T.L. BOUSCAREN, *Canon Law*, p. 637.

[70] Cf. J. KAMAS, *The Separation of the Spouses* p. 230.

[71] Commentators also recognized the possibility of perpetual separation for religious reasons. Cf. J. KAMAS, *The Separation of the Spouses*, p. 162: "Another point that must be noted is that no canon, expressly dealing with separation by mutual consent for religious motives, was inserted among the separation canons. However, it was commonly held in accordance with the pre-Code discipline and in virtue of canon 1128 that spiritual motives are a just cause that excuses the spouses from the obligation of conjugal cohabitation."

stated, "Because of the adultery of a spouse, the other spouse […] has the right of dissolving, even in perpetuity, the communion of life […]." When one spouse committed adultery, the innocent spouse had the right to unilaterally effect a separation on his or her own authority. Many commentators agreed that the innocent spouse did not have to approach the ecclesiastical authority at any time in order to legitimately effect a separation, as long as the adultery was certain.[72] Cappello said, "[…] the spouse has the right to divorce from the words of Christ themselves. The sentence of a judge only declares that the cause or adultery indeed exists from the things having been deduced; when the adultery is certain and notorious, the deduction and declaration are not necessary."[73] Therefore, in the case of certain adultery, it was the spouse's own authority which effected a legitimate separation.

The second situation wherein a party was able to separate *propria auctoritate* was when the cause for separation was not adultery, but there was danger in delay.[74] Forbes said, "Danger of delay is […] verified when the innocent spouse cannot, without grave loss to soul, body, or even temporal goods, recur to the Ordinary or await his judgment in the case."[75] Thus,

[72] The commentators all agreed that certitude of the offense, whether adultery or any other cause, was required before the innocent spouse was allowed to separate by his or her own authority. However, it was debated whether the certitude had to be provable in the external forum. Gasparri argued against Aquinas that if the adultery is certain but occult, the innocent spouse still has the right to separate by his or her own authority, but only in the forum of conscience, see P. Gasparri, *Tractatus*, p. 246; see also T. AQUINAS, *Summa theologica*, English translation in FATHERS OF THE ENGLISH DOMINICAN PROVINCE, *Summa theologica*, vol. 3, New York, Benziger Brothers Inc., 1947, supplement, Q. 63, art. 3. See also E.A. FORBES, *The Canonical Separation of Consorts*, p. 188-189; cf. S. WOYWOD, *A Practical Commentary*, p. 815, which stated, "The Code does not give an answer to this question."

[73] "[…] *quia ex ipsis verbis Christi coniux ius habet ad divortium. Sententia iudicis tantum declarat ex deductis causam seu adulterium revera existere; quae deductio et declaratio necessaria non est, quando adulterium est certum et notorium*" F.M. CAPPELLO, *Tractatus*, p. 761; cf. P. GASPARRI, *Tractatus*, p. 246: "The reason is because the spouse has the right to divorce from the law of the Gospel itself, so that the sentence of the judge should only declare that the cause, that is, the adultery, is verified; however, this declaration is not necessary when the adultery is certain and notorious," "*Ratio est quia coniux ad divortium ius habet ex ipsa Evangelii lege, ita ut sententia iudicis tantum declaret causam idest adulterium verificari; atqui haec declaratio necessaria non est, quando adulterium est certum et notorium.*" cf. F.X. WERNZ, *Ius canonicum*, p. 845; see also E.A. FORBES, *The Canonical Separation of Consorts*, p. 230; and, J. KAMAS, *The Separation of the Spouses*, p. 160-162, who is of the opinion that even in the case of certain and notorious adultery, the intervention of the ecclesiastical authority is necessary to give the separation juridic effects.

[74] See CIC/17 c. 1131.

[75] E.A. FORBES, *The Canonical Separation of Consorts*, p. 190.

danger of delay was a reason, alongside adultery, which allowed the innocent spouse to separate *propria auctoritate*.

Some commentators, especially prior to the codification of the law, made a distinction between a 'departure' and a 'separation' in relation to the cessation of cohabitation by the spouse's own authority.[76] Certain authors argued that adultery or danger of delay afforded the innocent spouse the moral right to depart, but this departure lacked any juridic effects. Regatillo summed up this argument well when he stated:

> Effects of separation made *propria auctoritate*—This has a *merely moral* effect, in relation to peace of conscience. The innocent consort in the above-mentioned cases, of course, separates *licitly*. But [the separation] lacks juridic value, namely as far as the effects of law are concerned. Thus, although an innocent wife, on account of the adultery of her husband, separates licitly from him perpetually on her own authority, yet she cannot acquire her own domicile, but necessarily retains the domicile of her husband.[77]

At stake here was whether a separation *propria auctoritate*, either due to adultery or danger of delay, produced any juridic effects.

The primary juridic effect of a legitimate separation, according to the 1917 *CIC*, was the suspension of the obligation of cohabitation.[78] Another correlated juridic effect was that the woman could obtain her own domicile.[79] Moreover, the suspension of the obligation of cohabitation entailed significant juridic consequences. For example, commentators on the 1917 *CIC* often discussed the possibility of the spouses being forced to resume cohabitation through the intervention of the ecclesiastical authority.[80]

[76] Cf. J.P. KING, *The Canonical Procedure*, pp. 55-56.

[77] E.F. REGATILLO, *Ius sacramentarium*, 3rd edition, Santander, Editorial Sal Terrae, 1964, p. 892 (=E.F. REGATILLO, *Ius sacramentarium*), English translation in E.A. Forbes, *The Canonical Separation of Consorts*, pp. 235-236.

[78] Cf. E.A. FORBES, *The Canonical Separation of Consorts*, p. 222.

[79] In the discipline of the 1917 Code, the woman could not obtain her own domicile apart from the domicile of her husband, unless there was a legitimate separation. See CIC/17 c. 93. Cf. M.L. GIBBONS, *Domicile of Wife Unlawfully Separated from Her Husband*, Washington, D.C., The Catholic University of America Press, 1947 (=M.L. GIBBONS, *Domicile of Wife*); cf. J.P. KING, *The Canonical Procedure*, p. 66.

[80] Woywod describes this as the capacity of the judge to "order the resumption of cohabitation" (S. WOYWOD, *A Practical Commentary*, p. 815). If a separation was effected by the innocent spouse due to adultery which is occult, Gasparri states that upon the guilty spouse's recourse to the ecclesiastical authority, the innocent spouse "must be compelled to receive back the dismissed spouse by a judge," "[…] *dimissum coniugem recipere a iudice compellendus est* […]" (P. GASPARRI, *Tractatus*, p. 246). Cf. E.A. FORBES, *The Canonical Separation of Consorts*, p. 137: "The injured spouse has the right to petition the public

A sentence ordering the resumption of cohabitation by an ecclesiastical authority was possible because of the obligation to preserve cohabitation, as stated in canon 1128. This obligation gives each spouse "a strict right in justice to demand this."[81] However, a legitimate separation extinguished this right, at least temporarily. Another consequence of the juridic effect of the suspension of cohabitation, according to some of the commentators on the 1917 *CIC*, was in relation to the reception of the sacraments. Some commentators argued that an illegitimate separation disbarred the parties from the reception of the sacraments until cohabitation was restored or a legitimate separation was obtained.[82]

King mentioned that commentators on the 1917 *CIC* were divided as to whether a separation *propria auctoritate* produced juridic effects. He stated that there were three different opinions in this regard.[83] Forbes represented one of the three opinions. He stated that a wife separated by her own authority was, according to the "common opinion of the authors," able to acquire her own domicile.[84] Therefore, according to this opinion, separation *propria auctoritate*, whether for adultery or danger of delay, obtained full juridic effects. However, Forbes warned that there is "great danger attached to the exercise of this right. The aggrieved partner is liable to institute separation for non-canonical causes and without the required certainty."[85] In fact, according to this opinion, it can be supposed that if a separation *propria auctoritate* was done for a non-canonical reason, then the juridic effects would not be obtained.[86]

A second opinion was represented by Regatillo, as seen above.[87] Likewise, Gibbons also distinguishes "a legitimate separation from a legitimate

ecclesiastical authority to force the return of his partner who has departed for an unjust reason." Moreover, the innocent party always retains the right to recall the guilty party to the common life. "If the guilty refuses to return, he can be forced to do so by ecclesiastical sentence and sanction" (E.A. FORBES, *The Canonical Separation of Consorts*, p. 227).

81 J.P. KELLY, "Separation and Civil Divorce," p. 190.

82 J.P. Kelly suggests that absolution cannot be given to parties who have solicited a civil divorce without permission until they "resume common life […or] seek an ecclesiastical separation" (J.P. KELLY, "Separation and Civil Divorce," pp. 209-210). Cf. P.M. CORONATA, *Institutiones*, p. 986. See also QUINN, H.G., "Permission for Separation and Divorce," in *The Jurist*, 14 (1954), p. 246 (=H.G. QUINN, "Permission for Separation and Divorce").

83 See J.P. KING, *The Canonical Procedure*, p. 68.

84 E.A. FORBES, *The Canonical Separation of Consorts*, p. 233.

85 *Ibid*., p. 186.

86 Indeed, juridic certainty would be well served by requiring a formal separation by the ecclesiastical authority. However, the 1917 Code does not explicitly require this.

87 Cf. E.F. REGATILLO, *Ius sacramentarium*, p. 892.

departure."[88] According to this opinion a legitimate separation produced juridic effects, whereas a legitimate departure "connotes a juridical state, but devoid of the canonical or juridical effects."[89] J.P. Kelly also espoused this opinion with some slight nuance.[90] Therefore, according to this opinion, separation *propria auctoritate*, whether because of adultery or danger of delay, was a morally licit action, but it produced no juridic effects.

The third opinion, which was held by many of the pre-Code commentators, and by King himself, "allows the canonical effects immediately to a separation effected because of certain adultery, but in the case of temporary separation it demands an authoritative review of the case if the effects are to follow."[91] According to this opinion, in the case of certain adultery, the juridic effects were granted by the "evangelical law," and a "sentence by the ecclesiastical authority was considered unnecessary and superfluous."[92] On the other hand, a temporary separation *propria auctoritate*, due to danger of delay, "was considered an emergency measure, and necessitated subsequent action in the ecclesiastical forum to be legitimate. Consequently, it is termed a *discessus* rather than a *separatio*."[93] So, this third opinion considered the two types of separation by private authority to have two different natures. Unfortunately, the 1917 *CIC* gave no clear indication whether or not a separation *propria auctoritate* for canonical reasons obtained juridic effects.[94] Moreover, as we have just seen, the commentators themselves were divided on this issue. Therefore, we can draw no certain conclusions at this point.

88 J.P. KING, *The Canonical Procedure*, pp. 69-70; cf. M.L. GIBBONS, *Domicile of Wife*, pp. 90-91.

89 J.P. KING, *The Canonical Procedure*, p. 70.

90 Kelly states that a decree of the ecclesiastical authority is necessary: "It would seem that such effects cannot be attributed to separation by the private authority of the parties unless an ecclesiastical judge examines the circumstances surrounding the separation, and issues a decree that the separation by the private authority of the parties was legitimate at the time it took place" (J.P. KELLY, "Separation and Civil Divorce," p. 204). However, according to this thesis, it is unclear which act produces the juridic effects; the legitimate separation or the decree of the judge?

91 J.P. KING, *The Canonical Procedure*, p. 71. See also E.A. FORBES, *The Canonical Separation of Consorts*, pp. 230-231.

92 J.P. KING, *The Canonical Procedure*, p. 71. We have already seen that Cappello and Gasparri hold this opinion as well (cf. note 73 above).

93 *Ibid*., p. 72. King also claims that "In examining the recent legislation on the institute of separation effected *propria auctoritate*, as contained in canons 1129-1131, it is difficult to find any real departure or developments in this institute from the interpretation of the pre-Code authors" (ibid. p. 72).

94 According to J.P. Kelly, the canons of the 1917 Code on the separation of spouses "are not too well written" (J.P. KELLY, "Separation and Civil Divorce," p. 203).

2.3 — The Changing Attitudes toward Civil Divorce

Once a separation is endowed with juridic effects, the only things lacking are the civil effects.[95] However, historically the Holy See did not allow Catholics to approach the civil forum.[96] Moreover, the Church in the United States had particular law prohibiting Catholics from seeking a civil divorce, which was not abrogated by the 1917 *CIC*.[97] And yet, in the twentieth century, more and more Catholics were having recourse to the civil forum despite the prohibitions by the Church.[98] The 1917 *CIC* did nothing to solve this problem.[99]

Nevertheless, in the early twentieth century the Holy See was becoming more lenient. In a private reply from the Holy Office, which was made known to Cardinal Gasparri and subsequently made known to the world through him, a woman was permitted to approach the civil authorities for a divorce. Gasparri stated:

> Whatever may be concerning past times, when we were being inclined to a rigid opinion seemingly favored by the Holy Office, which was supreme in these questions, today the Holy Office seems to follow a more mild opinion. Indeed in a proposed doubt in a particular case "Whether it is able to be permitted that a woman asks for divorce from a civil tribunal because of a most grave cause," the same Sacred Congregation, on the 6 day of August 1906, having to respond, offered the opinion: "In view of the peculiar circumstances surrounding the case, it can be permitted, provided the woman petitioner declare under oath before the Ordinary or his delegate and two witnesses, that she is not breaking the marriage bond, but only wishes to be released from the obligations of the civil ceremony; provided also that scandal be removed in the best way it can according to the judgment of the bishop."[100]

[95] It seemed to be taken for granted by the commentators on the 1917 Code that a separation granted by the civil authorities alone constitutes "a juridical action which is null and void in reality and before God" (Ibid. p. 218).

[96] Cf. the Historical Introduction above.

[97] Cf. the Historical Introduction above; cf. J.P. KELLY, "Separation and Civil Divorce," pp. 218-219.

[98] Cf. E.A. FORBES, *The Canonical Separation of Consorts*, p. 138; cf. H.G. QUINN, "Permission for Separation and Divorce," p. 239; cf. J.P. KELLY, "Separation and Civil Divorce," p. 187.

[99] King suggests that the reason why the 1917 Code did not address the problem of Catholics wanting a civil divorce was because of the great variety in divorce laws throughout the world. See J.P. KING, *The Canonical Procedure*, p. 141.

[100] "*Quidquid sit de anteactis temporibus, quando nos ipsi in rigidam opinionem inclinabamur, cui S.C.S. Officii, quae in his quaestionibus suprema est, favere videbatur, hodie S. Officium mitiorem sententiam sequi videtur. Proposito enim dubio in casu particulari*

Thus, for possibly the first time the Holy See allowed a person to approach the civil forum for a divorce. However, there was still considerable confusion due to the fact that this was a mere private reply and other private replies were much stricter.[101]

The promulgation of the 1917 *CIC* and the subsequent juridic and moral discussions which followed seemingly did little to reinforce in the Catholic mind that separation cases belonged exclusively to the Church.[102] Mackin attributes this phenomenon not to a certain moral laxity like many of the commentators on the 1917 *CIC* did, but rather to a fundamental cultural shift. Mackin notes that this shift coincides with the demographic shift away from rural farmlands and into cities. He says:

> Acknowledged or not by Catholic Europe, its people's understanding of marriage as a natural union of man and woman was a device for continuing family and land. […] [However, with the cultural shift] marriage begins to be seen and felt as a different kind of institution, even if the difference is barely articulated in the popular mind. […] In other words, in this transition men and women see marriage less as an instrument for securing a good outside itself. Now in their minds marriage becomes a good in its own right.[103]

As the cultural attitudes toward divorce shifted, it became easier and easier to obtain a civil divorce. By the 1920's, "every one of the Western European

'Num permitti possit ut mulier ob gravissimas causas petat divortium a tribunali civili', eadem Sacra Congregatio, die 6 Augusti 1906, respondendum censuit: 'Attentis peculiaribus circumstantiis in casu concurrentibus, permitti posse, dummodo mulier oratrix coram Ordinario vel eius delegato ac duobus testibus etiam iureiurando declaret se matrimoniale vinculum nullatenus abrumpere, sed tantummodo a civilis ritus oneribus exsolvi velle; remoto scandalo quo meliori modo iudicio Episcopi fieri poterit'" (P. GASPARRI, *Tractatus*, p. 337).

[101] Cf. J.P. KING, *The Canonical Procedure*, p. 149; See also S. WOYWOD, *A Practical Commentary*, p. 821: "The Holy See has invariably given an evasive answer, which shows clearly that the Church does not as yet want to decide the question definitively." Nevertheless, certain commentators offered helpful advice in navigating the question of when a spouse can lawfully approach the civil forum for a divorce. Cf. P.M. CORONATA, *Institutiones*, pp. 982-989. In general, Coronata stated that one is allowed to ask for a civil divorce only if there is "a most urgent and most grave cause proven by the Ordinary," "[…] *urgentissima et gravissima causa ab Ordinario probata habeatur*" (ibid. p. 985). See also F.M. CAPPELLO, *Tractatus*, p. 768; cf. T.L. BOUSCAREN, *Canon Law*, p. 638.

[102] Cf. J.P. KELLY, "Separation and Civil Divorce," p. 215: "[…] innumerable Catholics now no longer regard the dissolution of the marriage bond by the civil authorities as a usurpation of the jurisdiction of the Church and a violation of the Divine Law, but rather complacently accept this as a right belonging to the State."

[103] T. MACKIN, *Divorce and Remarriage*, New York, Paulist Press, 1984, p. 454 (=T. MACKIN, *Divorce and Remarriage*).

states in question, again excepting Ireland, Spain and Italy, had made civil divorce available to their citizens, Catholics included."[104]

The cultural shift continued well into the twentieth century. The 1960's signaled a dramatic shift in the United States, as well as in many other Western countries, away from a fault based system to a no-fault system of divorce.[105] As we have already seen, the fault based system has a long history, stretching back at least to Gratian. The Church also responded to the cultural shift, not in terms of new no-fault ecclesiastical legislation, but in terms of a new pastoral approach.

The Second Vatican Council initiated a pastoral shift in how the Church confronted the issue of divorce. The schema on marriage, drafted for the opening of the Second Vatican Council, treated marriage in its juridical aspects. However, the Council rejected this schema and opted for a more theological treatment of marriage.[106] Despite intense efforts, the Second Vatican Council failed to provide a concrete answer to the problem of divorce.[107] Nevertheless, the Council did succeed in ushering in a dramatic change in the way the Church approached the issue of divorce. After the Council, the emphasis was placed on pastoral ministry to the divorced and remarried. In Cincinnati, the sin of obtaining a divorce without permission was reserved to the local ordinary. This was abrogated in 1975.[108] Shortly thereafter, the United States bishops petitioned the Holy See to have the particular laws from the Council of Baltimore criminalizing divorce abrogated.[109] Then, in 1980, Pope John Paul II called an ordinary Synod of Bishop to deal with issues pertaining to the family.

The 1980 Synod of Bishops was the zenith of the change in attitude which began with the Second Vatican Council. Before the Council, Catholics in the United States could have had a canonical penalty imposed for approaching the civil forum, and they could be denied admittance to the sacraments.[110] By the time of the 1980 Synod of Bishops, such measures were almost unthinkable. In fact, during the Synod, "It was emphasized that they [the divorced and remarried] are not excommunicated, but on the

[104] *Ibid.,* p. 453.

[105] Cf. M.A. FINE and D.R. FINE, "An Examination and Evaluation of Recent Changes in Divorce Laws in Five Western Countries: The Critical Role of Values," in *Journal of Marriage and the Family*, 56 (1994), pp. 249-263.

[106] See T. MACKIN, *Divorce and Remarriage*, p. 462-481.

[107] Cf. J. KAMAS, *The Separation of the Spouses*, p. 177.

[108] Cf. CLD vol. 8, pp. 562-563.

[109] Cf. J. KAMAS, *The Separation of the Spouses*, p. 195.

[110] Cf. note 82 above.

contrary, they must be supported by all ecclesiastical communities […]. There are no obstacles to the reception of the sacraments for those who have undergone divorce, irrespective of culpability, and who did not engage in a second marriage."[111] Civil divorce was no longer seen as the enemy but rather as a problem in need of a solution.[112] Moreover, the canonical discipline in force at that time was viewed as inadequate for the task[113] and even too severe for those who suffer as a result of divorce.[114]

2.4 — The *Ius Vigens*: The 1983 CIC and the 1990 CCEO

Vatican II provided a new impetus in the Church's reflection about marriage. The revision of the *CIC* and creation of the *CCEO* were profoundly marked by the theological reflections of Vatican II.[115] Even though the present legislation remains in substantial continuity with the canonical tradition, the richer theological understanding of marriage resulting from the Council reformed the juridic institute of the separation of spouses in subtle ways.

2.4.1 — *The Norms of the 1983 Codex Iuris Canonici in Light of the Revision Process*

As we have already seen, the 1917 *CIC* saw separation of spouses as a cessation of cohabitation.[116] However, arising from the theological and juridical reflections following the Council about the nature of marriage, the separation of spouses began to be seen with fuller juridical implications.[117]

[111] J. KAMAS, *The Separation of the Spouses*, p. 189; cf. JOHN PAUL II, Apostolic Exhortation on the Role of the Christian Family in the Modern World *Familiaris consortio*, 22 November 1981, in *AAS*, 74 (1982), nn. 83-84, pp. 81-191, English translation in J.M. MILLER (ed.), *The Post-Synodal Apostolic Exhortations of John Paul II*, Huntington, Our Sunday Visitor, 1998, pp. 147-233.

[112] Cf. J. KAMAS, *The Separation of the Spouses*, p. 194.

[113] Cf. J. GROOTAERS and J.A. SELLING, *The 1980 Synod of Bishops "On the Role of the Family": An Exposition of the Events and an Analysis of Its Texts*, Leuven, University Press, 1983, p. 100; cf. J. KAMAS, *The Separation of the Spouses*, p. 185.

[114] Cf. J. KAMAS, *The Separation of the Spouses*, p. 191.

[115] Kamas notes that Vatican II and the 1980 Synod of Bishops "became a basis for the present legislation and juridical approaches concerning the matrimonial issues" (*ibid*. p. 173).

[116] Cf. section 2.2 above.

[117] Cf. J. KAMAS, *The Separation of the Spouses*, p. 213: "[…] the traditional triple division of marital communion to bed, board and habitation has been supplanted by the more suitable and expanded notion of living together as a mutual sharing in each other's lives and possessions."

Hervada states, "Separation does not only involve suspension of common life and of the duty of the spouses to live together, but also entails the suspension of conjugal rights and obligations in general, with the exception of certain aspects."[118] Cohabitation should not be confused with any of the rights and obligations of marriage, per se.[119] Cohabitation creates the possibility for exercising these rights, and thus, the spouses have the right and obligation to maintain cohabitation.[120] Consequently, in order to fully understand the nature of the separation of spouses in the 1983 *CIC*, one must first understand the rights and obligations of marriage, as well as the nature of the bond from which they arise.

The bond of marriage is not a physical or spiritual substance. Gramunt says that the bond of marriage is "a non-sensible *relation* […] an *accidental quality* of the person […] a man has the quality of 'husband' in relation with a woman and a woman has the quality of 'wife' in relation with a man."[121] This ontological category of 'relation' constitutes an unbreakable juridical relationship between the man and woman. Throughout the entire course of their natural lives, the man and woman will be related to one another as spouses, regardless of their will to break this bond or of a civil divorce.[122] Moreover, the rights and obligations of marriage arise from this bond. Gramunt says that the rights and obligations of marriage are "the *content of this juridical relationship*."[123]

The 1983 *CIC* does not contain a list of the rights and obligations of marriage. However, canonists have deduced some of the rights and obliga-

[118] J. HERVADA, "Separation While the Bond Remains," in *CCLA*, p. 894 (=J. HERVADA, "Separation While the Bond Remains").

[119] Cf. J. ESCRIVÁ IVARS, "Art. 2: Separation While the Bond Remains," in *Exegetical Comm*, vol. 3/2, p. 1569 (=J. ESCRIVÁ IVARS, "Separation While the Bond Remains"); cf. J. HERVADA, "Separation While the Bond Remains," p. 897.

[120] Cf. *Codex iuris canonici*, *auctoritate Ioannis Pauli PP. II promulgatus*, *fontium annotatione et indice analytico-alphabetico auctus*, Libreria editrice Vaticana, 1989, English translation *Code of Canon Law: Latin-English Edition*, *New English Translation*, prepared under the auspices of the CANON LAW SOCIETY OF AMERICA, Washington, DC, Canon Law Society of America, 1999, c. 1151 (=*CIC*/83). This translation is used in all subsequent citations of the canons of the 1983 Code.

[121] I. GRAMUNT, "The Essence of Marriage and the Code of Canon Law," in *StC*, 25 (1991), p. 374 (=I. GRAMUNT, "The Essence of Marriage").

[122] The only exceptions to this general rule are the dissolutions of marriage allowed for in the Code of Canon Law, namely, dissolution of a non-consummated marriage (cf. CIC/83 c. 1142), dissolution of marriage by way of the Pauline Privilege (cf. CIC/83 cc. 1143-1147), and dissolution of marriage in favor of the faith (cf. CIC/83 cc. 1148-1150 as well as the special norms of the Congregation for the Doctrine of the Faith).

[123] I. GRAMUNT, "The Essence of Marriage," p. 381.

tions of marriage from the definition of marriage contained in cc. 1055-1056 of the 1983 *CIC*.[124] Mendonça argues that, "on the juridical plane," married life is "the sum total of all the rights and obligations of marriage."[125] Within this totality he identifies several rights, including the "right to communion of life,"[126] the "right to that conjugal love which is ordered to the good of the spouses and of offspring,"[127] the "right and obligation to conjugal acts which are naturally open to the generation of offspring,"[128] the "right to the 'good of offspring,'"[129] and the "right/obligation to […] the mutual fidelity, that is, exclusivity as it pertains to acts proper to conjugal life."[130] As Hervada has noted, not all of these rights and obligations are suspended through a separation.[131] A separation suspends cohabitation, but it also suspends the right to an intimate interpersonal relationship, and the right to that conjugal love which provides mutual assistance to the spouses, as well as the right to conjugal acts suitable for procreation. On the other hand, a separation does not suspend the obligation to promote the overall well-being of the offspring, nor does it suspend the obligation of mutual fidelity.

The section of the 1983 *CIC* dealing with separation of spouses begins with the obligation to maintain cohabitation. Canon 1151 of the 1983 *CIC* is substantially the same as canon 1128 of the 1917 *CIC*. However, the wording has been changed, in part, to highlight the "juridical obligations," rather than the moral obligations.[132] The canon does not directly state that the spouses have the right and obligation to maintain 'cohabitation,' preferring instead the phrase 'conjugal living.' This wording was employed to make it

[124] Cf. A. MENDONÇA, "The Theological and Juridical Aspects of Marriage," in *StC*, 22 (1988), pp. 265-304 (=A. MENDONÇA, "The Theological and Juridical Aspects of Marriage").

[125] *Ibid.,* p. 275.

[126] *Ibid.,* pp. 275-276. He describes this as an intimate interpersonal relationship.

[127] *Ibid*., p. 281. Perhaps included in this is the right and obligation for the mutual assistance of the spouses.

[128] *Ibid*., p. 290.

[129] *Ibid*., p. 290. One way to understand this is the right and obligation to promote the overall well-being of the child.

[130] *Ibid*., p. 292-293.

[131] See J. HERVADA, "Separation While the Bond Remains," p. 894; cf. Kamas, p. 212, which states, "When a separation has taken place, certain—but not all—rights and obligations are suspended (for example, living in the same house, conjugal acts), and others are restricted in their exercise" (J. KAMAS, *The Separation of the Spouses*, p. 212).

[132] "[…] *obligationes iuridicas* […]" PONTIFICAL COMMISSION FOR THE REVISION OF THE CODE OF CANON LAW, *Coetus studiorum* "*De matrimonio*," *Sessio 16*, *Adunatio I-V*, in *Communicationes*, 34 (2002), p. 235 (=1972 *Coetus* on substantive law).

clear that marriage itself is not liable to suspension, but merely cohabitation and the corresponding rights and obligations.[133]

There was considerable discussion among the members of the *coetus* about the revision of canon 1129 of the 1917 *CIC*, which concerns separation due to adultery. According to several consultors, canon 1129 was thought to be too severe, insofar as a single act of adultery brought with it "a perpetual privation of the right for the communion of conjugal life."[134] One consultor suggested assuaging the severity of this canon by granting "the innocent party the right of dissolving, by his or her own will, the communion of life if the separation is for a time; but for a perpetual separation the decree of a legitimate authority must intervene."[135] This suggestion was a significant innovation from the older canonical doctrine. The 1917 *CIC* afforded the innocent spouse the right to sever cohabitation perpetually by his or her own authority, in the case of adultery. Whereas, for a temporary separation, it was commonly agreed that the intervention of the ecclesiastical authority was necessary, unless there was danger in delay. The proposal by the *coetus* reversed the traditional order by *requiring* ecclesiastical intervention for causes of permanent separation, but not for temporary ones. There was, in fact, a general consensus within the *coetus* that the penal character, which had characterized the juridic institute of separation of spouses since Gratian, should be eliminated or at least lessened.[136]

In the end, the first paragraph of canon 1152 still retains the innocent spouse's right to separate, but it also emphasizes the value of forgiveness.[137]

[133] Cf. CIC/83 c. 1151. The phrase 'conjugal living' is in continuity with the 1917 Code, which used the phrase 'communion of conjugal life,' the same phrase originally used in the first draft of canon 1151 of the 1983 Code. However, the decision was made to change the phrase to 'conjugal living,' "because the saying 'communion of life' was applied in the definition of matrimony and would cause confusion in the present canon," "*quia locution 'communio vitae' adhibita est in definitione matrimonii et in praesenti canone confusionem gigneret*" (PONTIFICAL COMMISSION FOR THE REVISION OF THE CODE OF CANON LAW, *Coetus studiorum de iure matrimoniali*, in *Communicationes*, 10 (1978), p. 118 [=1978 *Coetus* on substantive law]).

[134] 1972 *Coetus* on substantive law, p. 237: "[…] *privationem perpetuam iuris ad vitae coniugalis communionem.*"

[135] *Ibid*., p. 237: "[…] *parti innocenti ius solvendi communionem vitae, pro suo lubitu, si separatio sit ad tempus; pro separatione vero perpetua intervenire debet decretum legitimae auctoritatis*."

[136] Cf. J. KAMAS, *The Separation of the Spouses*, p. 290; cf. J. ESCRIVÁ IVARS, "Separation While the Bond Remains," p. 1570.

[137] Hervada notes, "There are no innovations […] except that the style is more pastoral, intended to induce the offended spouse not to seek separation" (J. HERVADA, "Separation While the Bond Remains," p. 896).

On the other hand, the proposed draft of §3 stated that the innocent spouse "must introduce a cause for separation within six months."[138] Later, this phrase was changed to read: "the spouse is to introduce a cause for separation within six months."[139] The discussion of the *coetus*, as it has been preserved in *Communicationes*, does not give any direct answer about why the proposed norm was changed from "*debet* […] *deferre*" to "*deferat*."[140] The only indication given for the motivation behind this change comes from the discussion which preceded the change. This prior discussion concerned the spouse's right to separation vis-à-vis the power of the ecclesiastical authority to determine whether a separation should be permanent or temporary:

> About §3 a certain consultor had an observation, which he thought that the innocent spouse has the *right* to separate perpetually if he himself should choose that.
>
> Another consultor thought that the innocent spouse has the right to separate; however, it pertains not to himself but to the ecclesiastical authority to determine whether the separation ought to be temporary or perpetual.[141]

Immediately after this exchange, the notes of the gathering omit part of the discussion and merely report that "after some discussion" the norm was altered.[142] Therefore, it is reasonable to conclude that the change from "*debet* […] *deferre*" to "*deferat*" indicates that the *coetus* wanted to give a greater degree of autonomy in the exercise of the right of the innocent party to separate by his or her own authority, since recourse to the ecclesiastical authority is merely an exhortation rather than a strong obligation. A greater degree of autonomy afforded to the innocent spouse accords well with the canonical tradition as it was articulated after the Council of Trent.[143]

[138] 1972 *Coetus* on substantive law, p. 243: "[…] *debet intra sex menses causam separationis* […] *deferre*."

[139] 1978 *Coetus* on substantive law, p. 119: "[…] *intra sex menses causam separationis deferat* […]."

[140] According to Huels, a shift from "*debet*" to the present subjunctive indicates a shift from a strong obligation to a mild command or exhortation (See J.M. HUELS, *Liturgy and Law: Liturgical Law in the System of Roman Catholic Canon Law*, Montréal, Wilson & Lafleur, 2006, p. 234-235).

[141] 1978 *Coetus* on substantive law, p. 119: "*Circa §3 habetur animadversio cuiusdam Consultoris, qui censet coniugem innocentem habere ius ad separationem perpetuam si ipse illam eligat*.
"*Alter Consultor autem censet coniugem innocentem habere ius ad separationem; non ipsi autem sed auctoritati ecclesiasticae pertinet determinare utrum separatio debeat esse temporanea vel perpetua*."

[142] *Ibid.,* p. 119: "*Post aliquam discussionem aliquis Consultor hanc formulam proponit* […]."

[143] Cf. the Historical Introduction above.

Moreover, during this same mysterious lacuna in the discussion, the proposed draft of canon 1152 §3 was changed in another way. At the beginning of the discussion, the proposed canon said that the competent authority "decides whether a separation may legitimately be protracted whether for a time or perpetually,"[144] but afterwards the proposed canon stated that the competent authority "is to consider carefully whether the innocent spouse can be moved in order that he or she may condone the fault and not prolong the separation perpetually."[145] The latter gives the innocent spouse the power to make the separation perpetual, whereas the former gives the ecclesiastical authority the power to determine the length of separation. So, it seems that the *coetus* desired to temper the competent authority's power in this regard.[146]

While the *coetus* originally wanted to require the ecclesiastical intervention in the event of perpetual separation, it ended up recognizing the innocent spouse's right to separate perpetually *propria auctoritate*. Thus, the traditional doctrine prevailed; however, the spouses are now asked not to act completely independently of the ecclesiastical authority.[147]

A fundamental question remains, namely, what is the nature of ecclesiastical intervention in the case of adultery? On the one hand, canon 1152 §3 states that "the spouse is to introduce a cause for separation." This seems to imply that in a situation of separation *propria auctoritate* due to adultery the act of ecclesiastical intervention has the same nature as the decree or sentence for a temporary separation. On the other hand, it seems that the innocent spouse has considerable decision making power. This could suggest that the act of ecclesiastical intervention in a situation of adultery is more akin to mediation rather than an act of the power of governance.

The first step in answering this question is to understand the nature of ecclesiastical intervention for causes other than adultery. To accomplish this it is necessary to introduce the concept of the juridic act. The 1917 *CIC* did not have a fully developed notion of a juridic act, whereas the 1983 *CIC* does have such a notion. According to Daniel, "A juridic act is a human act,

[144] 1972 *Coetus* on substantive law, p. 244: "[…] *decernat utrum separatio legitime protrahi possit sive temporanea sive perpetua*."

[145] 1978 *Coetus* on substantive law, p. 119: "[…] *perpendat si coniux innocens adduci possit ut culpam condonet et separationem non in perpetuum protrahat*."

[146] The 1917 Code stated explicitly that the innocent spouse "is never bound by the obligation of readmitting the adulterous spouse to the consortium of life" (CIC/17 c. 1130). While this new formulation does not state this right explicitly, it certainly implies it.

[147] Cf. J. KAMAS, *The Separation of the Spouses*, p. 245; cf. J. ESCRIVÁ IVARS, "Separation While the Bond Remains," p. 1573.

placed knowingly, freely, and externally according to the norm of law by a legally capable person, in order to bring about all the effects recognized by the law."[148] There are many examples of juridic acts throughout the 1983 *CIC*. When a separation is effected by a decree of the diocesan bishop, or by a sentence of a competent judge, the act is a juridic act.[149] The effect recognized by the law is the suspension of the rights and obligations of marriage. Carreras describes the decree of separation by the ecclesiastical authority as "the issuance of an act of a constitutive nature through which the ecclesiastical authority brings about a transformation of the obligatory content of the union."[150] This juridic act constitutes a new juridic status for the spouses. However, it is not so clear that the intervention of the ecclesiastical authority after a separation initiated by the innocent spouse's own authority in the case of adultery is such a juridic act.

The *coetus* for the revision of the canons on separation contemplated this question briefly, although it determined that it was not appropriate for the Code itself to answer it. The discussion went as follows:

> The sixth consultor asked from the fourth consultor whether such an intervention of the legitimate authority must be considered as declarative of the right of separation or not rather as of itself a constitutive element of the right.
>
> The Secretary expressed the opinion that such an intervention of the authority is only a declarative element.
>
> The fourth consultor however responded that such an intervention, in his own opinion, is also able to be constitutive. However, this question must not be solved in the Code, because it pertains to the doctrine.[151]

This discussion referred back to the debate among the commentators on the 1917 *CIC*.[152] If the intervention of the ecclesiastical authority is merely declarative, then, as the commentators have pointed out, a decree or sentence

[148] W.L. DANIEL, "Juridic Acts in Book VII of the 1983 *Codex Iuris Canonici*," in *StC*, 40 (2006), pp. 438-439 (=W.L. DANIEL, "Juridic Acts").

[149] Cf. W.L. DANIEL, "Juridic Acts," p. 434, 439-440.

[150] J. CARRERAS, "Chapter II: Cases Concerning the Separation of Spouses," in *Exegetical Comm*, vol. 4/2, p. 1898 (=J. CARRERAS, "Cases Concerning the Separation of Spouses").

[151] 1972 *Coetus* on substantive law, p. 238: "*Rev.mus sextus Consultor petit a Rev.mo quarto Consultore num talis interventus legitimae auctoritatis haberi debeat tanquam declarativus iuris separationis, an tamquam constitutivus ipsius iuris.*
"*Rev.mus Secretarius censet talem interventum auctoritatis esse tantum declarativum.*
"*Rev.mus quartus Consultor autem respondet talem interventum, pro sua sententia, etiam constitutivum esse posse. Attamen quaestio haec non est solvenda in Codice, quia pertinet ad doctrinam.*"

[152] Cf. section 2.2 above.

by the same authority "was considered unnecessary and superfluous."[153] On the other hand, if the intervention of the ecclesiastical authority is constitutive, then the rights and obligations of marriage are not suspended until the authority places a juridic act, i.e., a decree or sentence of separation.

If the act of the ecclesiastical authority in the situation of adultery is a constitutive act, then the act of separation *propria auctoritate* by the innocent spouse is merely a *de facto* separation. The cessation of cohabitation without the suspension of the rights and obligations of marriage is called a *de facto* separation. Escrivá Ivars states:

> *De facto* separation indicates the cessation of matrimonial cohabitation, established arbitrarily by the spouses, either with the consent of both parties or unilaterally. This separation does not modify the juridical relationship between the spouses; it only involves a change in cohabitation. It is in fact a real separation, in which the juridical relationship remains intact but not complied with."[154]

Consequently, a *de facto* separation does not cause the suspension of the rights and obligations of marriage. However, the law allows spouses to separate *propria auctoritate* in the case of adultery and danger of delay. Apart from these special situations, the intervention of the ecclesiastical authority is necessary prior to the cessation of cohabitation.[155] In a situation where there is no danger of delay, if the parties separate prior to the required ecclesiastical intervention, then their separation is an illicit *de facto* separation. Whereas, if the innocent party separates *propria auctoritate* due to danger of delay, then the *de facto* separation is licit. Nevertheless, the lawfulness of the *de facto* separation does not mean that it has any juridic effects.

In a situation not involving adultery, canon 1153 §1 states, "[…] that spouse gives the other a legitimate cause for leaving […] even on his or her own authority if there is danger in delay." The phrase "legitimate cause for leaving" indicates a *de facto* separation. Therefore, implicitly, the intervention of the ecclesiastical authority is necessary to produce the juridic effects.[156] The situation is different, however, in the case of adultery. Canon 1152 §1 states that the innocent "spouse has the right to sever

[153] J.P. KING, *The Canonical Procedure*, p. 71.

[154] J. ESCRIVÁ IVARS, "Separation While the Bond Remains," p. 1574.

[155] Cf. J. KAMAS, *The Separation of the Spouses*, p. 244.

[156] Canon 1153 does not explicitly state that ecclesiastical intervention is necessary in order to suspend the rights and obligations of marriage. However, this requirement can be logically deduced.

conjugal living." The first draft of this canon stated that the "adultery of a spouse provides to the other spouse a legitimate excuse from the obligation of maintaining the communion of conjugal life […]."[157] This formulation was deemed unacceptable, however, because "the right does not come forth from the adultery, but from the legislator."[158] For causes other than adultery, *the guilty spouse gives a reason* to leave, but in a situation of adultery, *the law gives a right* to separate. The right to separate has a different nature than the "legitimate cause for leaving" of canon 1153 §1, because a right enjoys the protection of the law.

As noted above, it has long been recognized that an aggrieved spouse can have recourse to the ecclesiastical authorities in order to force the resumption of cohabitation.[159] However, in the case of adultery, an action by the guilty spouse to vindicate his or her rights of marriage reveals an inherent conflict of rights, unless *ipso iure* the rights of the guilty spouse are suspended.[160] The legal basis for this argument is canons 221 §1 and 1491 of the 1983 *CIC*. Canon 221 §1 states, "The Christian faithful can legitimately vindicate and defend the rights which they possess in the Church […]," and canon 1491 states, "Every right is protected not only by an action but also by an exception unless other provision is expressly made." On the one hand, in the case of adultery, the innocent spouse has the *right* to sever conjugal living. On the other hand, if it is presumed that the separation by the innocent spouse is merely a *de facto* one, then the guilty spouse retains all of the *rights* and obligations of marriage, which theoretically can be vindicated in an ecclesiastical court. If the guilty spouse were to introduce such an action, the law affords the innocent spouse the possibility of raising a peremptory exception in order to protect the right of separation. A judgment in favor of the peremptory exception entails the denial of the guilty spouse's rights of marriage. A judgment in favor of the guilty spouse's marital rights entails the denial of the innocent spouse's right to separate.[161] However, if the act

[157] 1972 *Coetus* on substantive law, p. 239: "*Adulterium coniugis alteri coniugi legitimam praebet excusationem ab obligatione servandi vitae coniugalis communionem* […]."

[158] *Ibid*., p. 239: "[…] *ius non provenit ex adulterio, sed a legislatore*."

[159] Cf. section 2.2 above. Even the commentators on the 1983 Code recognize that such action is theoretically possible. Cf. L. Örsy, *Marriage in Canon Law: Texts and Comments*, Wilmington, Michael Glazier, 1986, p. 234; cf. W. Kowal and W.H. Woestman, *Special Marriage Cases and Procedures*, 4th edition revised and updated, Ottawa, Faculty of Canon Law, Saint Paul University, 2008, p. 133 (=W. Kowal and W.H. Woestman, *Special Marriage Cases*).

[160] It must be remembered that adultery, in itself, does not suspend the rights of marriage.

[161] The problem is not a conflict of rights, as such. The problem is that, in this scenario, the law itself would create a situation of incompatible rights *a priori*, that is to say, rights

of separation made by the innocent spouse is not merely a *de facto* separation but rather a juridic act suspending the rights and obligations of marriage, then the problem of these incompatible rights disappears. Therefore, it is appropriate that, *ipso iure*, the act of separation of the innocent spouse have the juridic effect of the suspension of the rights and obligations of marriage.

If, in fact, the innocent spouse is able to place a private juridic act suspending the rights and obligations of marriage, then the intervention of the ecclesiastical authority described in canon 1152 §3 is mediatorial rather than an act of the power of governance. Nevertheless, there are two alternatives to this theory. One alternative is that the law, in fact, requires an act of the power of governance to suspend the rights and obligations of marriage. However, this theory is problematic for at least four reasons: 1) as we have just seen, it leads to incompatible rights; 2) the requirement for ecclesiastical intervention in the case of certain adultery is contrary to the canonical tradition; 3) the current law avoids prescribing a strict obligation in this regard; and 4) the process of drafting the law shows that the power of the ecclesiastical authority was intentionally diminished in favor of the autonomy of the innocent spouse.

The second alternative is put forward by Kamas. He says, "If there is no hope or chance for reconciliation after intervention of ecclesiastical authority, *permanent separation* is granted *ipso facto* by the Evangelical Law. No further authoritative decree is needed. Any sentence by the ecclesiastical authority would be superfluous."[162] Kamas' theory implies that the act of the ecclesiastical authority is not an act of the power of governance. Moreover, he is incorporating an idea of honored tradition—expressed by Gasparri and Cappello among others[163]—that in a situation of certain adultery an act of the ecclesiastical authority is not necessary. However, Kamas' theory is also problematic for at least two reasons: 1) it leads to the same situation of incompatible rights described above; and 2) it grants a juridic fact, rather than a juridic act, the juridic effect of suspending the rights and obligations of marriage. The juridic fact in Kamas' theory is the fact of failed mediation. This juridic fact is a non-intentional act endowed with serious and weighty consequences. However, the perpetuity and gravity of the rights and obligations of marriage leads one to conclude that their suspension is more appropriately the result of a direct and intentional act. In fact,

which are universally and necessarily opposed to one another because they cannot be simultaneously exercised in the same situation.

[162] J. KAMAS, *The Separation of the Spouses*, p. 246.

[163] Cf. note 73 above.

in every other circumstance the rights and obligations of marriage are only suspended through a juridic act.[164] Therefore, there are significant reasons to reject Kamas' theory.

Before concluding this section, the nature and effect of a civil divorce in the current legislation needs to be determined. The 1983 *CIC* provides for the lacuna in the law of the 1917 *CIC*.[165] Canon 1152 §2 states that the presumption of condonation of adultery arises if the innocent spouse does not "make recourse to the ecclesiastical or civil authority" within six months. Kamas rightly notes that "the Church has made an innovation of no small importance in comparison with the previous Code."[166] However, this norm does not concede to the spouses the right to approach the civil forum independently of ecclesiastical authority, as is clear from the procedural norms.[167]

The positive norms regulating the possibility for spouses to approach the civil forum are found in Book VII on procedural law. The 1983 *CIC* has substantially retained the same declaration which was found in canon 1960 of the 1917 *CIC*. Canon 1671 of the 1983 *CIC* states that the Church enjoys competence over "marriage cases of the baptized […] by proper right." Moreover, canon 1692 §1 states that cases of separation of spouses can be decided (*decerni potest*) either by "a decree of the diocesan bishop or a judicial sentence […]."[168] Therefore, the civil forum has no jurisdiction in such cases. The civil authority only has jurisdiction over the civil effects of marriage.[169] Carreras states, "Since the transformation of the obligatory content of the bond is not limited to the civil effects of marriage, c. 1692 §1 implicitly establishes that cases of personal separation of the baptized must

[164] It is important to keep in mind that separation by one's own authority is exceptional and only allowed for adultery and danger of delay. As we have already seen, separation by one's own authority due to danger of delay does not have any juridic effects. Outside of the situation of adultery, the juridic effect of suspending the rights and obligations of marriage are only obtained through a decree of the diocesan bishop or through a sentence of a competent tribunal. Both a decree and a sentence are public juridic acts.

[165] As we have already seen, the 1917 Code did not include any norms about approaching the civil forum, which caused a certain amount of confusion. See section 2.3 above.

[166] J. KAMAS, *The Separation of the Spouses*, p. 258.

[167] See J. KAMAS, *The Separation of the Spouses*, p. 258.

[168] This canon does not imply that separation by a spouse's own authority is impossible, because "*decerni potest*" denotes a contentious matter settled by a judge or other authority. Therefore, the canon is merely indicating the ways in which the public authority can settle cases of separation of spouses.

[169] Cf. W. KOWAL and W.H. WOESTMAN, *Special Marriage Cases*, p. 137; cf. J. KAMAS, *The Separation of the Spouses*, p. 270; cf. D. KELLY, "Cases Concerning the Separation of Spouses," in *CLSGBI Comm*, p. 944.

be taken to the canonical forum."[170] Therefore, an act of the civil authority declaring the separation or divorce of baptized spouses lacks all juridic effects.[171] That is to say, the civil authority cannot effect the suspension of the rights and obligations of marriage.

However, unlike the 1917 *CIC*, the 1983 *CIC* affords the possibility for an act of the civil forum to obtain juridic effects. Canon 1692 §§2-3 provides three scenarios under which the diocesan bishop can grant permission for the spouses to approach the civil forum: 1) "Where an ecclesiastical decision has no civil effects," 2) "if a civil sentence is not contrary to divine law," 3) "if a case concerns only the merely civil effects of marriage […]." Under any of these three circumstances the diocesan bishop can grant permission for the spouses to approach the civil forum. This juridic act of permission has the effect of endowing the act of the civil authority with the juridic effect of suspending the rights and obligations of marriage. Therefore, the permission of the diocesan bishop is an act which grants the civil forum power over a sacrament of the Church. Certainly, the animosity of the previous era has waned.[172]

If, according to the theory presented above, the innocent spouse can place a juridic act suspending the rights and obligations of marriage, can the same spouse licitly approach the civil forum without permission from the diocesan bishop? On the one hand, the purpose of the permission of the diocesan bishop is to ensure that the civil act obtains juridic effects. Without this permission, the civil decree is no different from a *de facto* separation, except that it has civil effects. However, in the situation where the innocent spouse has produced these juridic effects *propria auctoritate*, the civil act needs no grant from the diocesan bishop. Therefore, it seems possible for such a spouse to approach the civil forum by his or her own authority.

On the other hand, the law has placed an obligation on all spouses to obtain the permission of the diocesan bishop before approaching the civil forum. The process of drafting canon 1692 highlights the fact that it is the diocesan bishop alone who can allow the spouses to approach the civil forum. Some members of the *coetus* in 1979 had suggested that if the case concerned merely the civil effects, then the judge himself could allow the

[170] J. CARRERAS, "Cases Concerning the Separation of Spouses," p. 1898.

[171] Cf. J. KAMAS, *The Separation of the Spouses*, p. 291: "[…] the suspension of the rights and obligations of marriage are not affected by a civil decision […]."

[172] Nevertheless, this is not to say that the Church embraces divorce. Cf. C.J. HETTINGER, "The Difficult Marriage," in *Homiletic and Pastoral Review*, vol. 99, no. 5 (1999), p. 15; cf. PONTIFICAL COMMISSION FOR THE REVISION OF THE CODE OF CANON LAW, *Coetus studii* "*De processibus*," *Sessio 11*, *Adunatio I-II*, in *Communicationes*, 40 (2008), p. 147.

parties to approach the civil forum.[173] However, this suggestion was not accepted by the *coetus*. Thus, even if a person wants the mere civil effects of a divorce, permission of the diocesan bishop is still required.

2.4.2 — *The 1990 Codex Canonum Ecclesiarum Orientalium*

The codification of Eastern law in many ways closely resembles the Latin *CIC* of 1983. Nevertheless, there are some significant differences. The codification of Eastern law does not include a statement about the obligation of maintaining cohabitation corresponding to canon 1151 of the Latin Code. *Nuntia* gives no explanation for why this norm was not included in the Eastern law. Canon 863 of the *CCEO*, the first canon of the Eastern Code on separation of spouses, is nearly identical to canon 1152 of the 1983 *CIC*. The *CCEO* ascribes to the innocent spouse "the right to sever the partnership of conjugal life" in the case of adultery.[174] However, in §3 of canon 863 it states that the innocent spouse "[…] *must* within six months file a suit for separation before the *competent authority* [emphasis added]."[175] This formulation corresponds to the earlier draft of the 1983 *CIC* before the *coetus* changed the strong obligation to a mild command.[176] Moreover, like the 1983 *CIC*, the *CCEO* has dropped the explicit statement about the innocent spouse's right to separate *propria auctoritate*. The Eastern predecessor to canon 1130 of the 1917 *CIC*, which stated explicitly that the innocent spouse can separate *propria auctoritate*, was *Crebrae allatae sunt* c. 119 which stated: "The innocent spouse, who had legitimately separated either by a sentence of a judge or by his or her own authority [*propria auctoritate*], is never obliged to admit back the adulterous spouse to the partnership of life […]."[177] However, this norm was not retained in the *CCEO*. Nedungatt

[173] See PONTIFICAL COMMISSION FOR THE REVISION OF THE CODE OF CANON LAW, *Opera consultorum in recognoscendis schematibus, Coetus studiorum de processibus, De causis separationis coniugum*, in *Communicationes*, 11 (1979), pp. 273.

[174] *Codex canonum Ecclesiarum orientalium*, *auctoritate Ioannis Pauli PP.II promulgatus*, *fontium annotatione auctus*, Libreria editrice Vaticana, 1995, English translation *Code of Canons of the Eastern Churches: Latin-English Edition*, *New English Translation*, Washington, DC, Canon Law Society of America, 2001, c. 863 (=*CCEO*). This translation is used in all subsequent citations of the canons of the 1990 Code.

[175] The CSLA translation mistakenly says "competent ecclesiastical authority."

[176] See 1978 *Coetus* on substantive law, p. 119; cf. section 2.4.1 above.

[177] "*Coniux innocens, sive iudicis sententia sive propria auctoritate legitime discesserit, nulla unquam obligatione tenetur coniugem adulterum rursus admittendi ad vitae consortium* […]," PIUS XII, *motu proprio* on marriage, *Crebrae allatae*, 22 February 1949, in *AAS*, 41 (1949), p. 114. Prior to the 1990 Codification of Eastern Law, the *motu proprio* of Pope Pius XII *Crebrae allatae sunt* contained an article on "separation from bed, board and

interprets these changes to mean that "Permanent separation, contrary to the previous norm (CA c. 119), is no longer permitted without the decision of the competent authority."[178] So, the Eastern law does contain a strong obligation for the innocent spouse to approach the competent authority in the case of adultery. On the other hand, the Eastern law does not specify that the competent authority is the ecclesiastical authority; however, in light of *CCEO* c. 1357 it can be deduced that only the ecclesiastical authority is competent.[179]

The final part of canon 863 of the *CCEO* is substantially the same as the corresponding canon in the 1983 *CIC*. Canon 863 §3 implicitly states that the innocent spouse can separate *propria auctoritate*. Also, the Eastern law, like the Latin law, describes the act of the ecclesiastical authority in terms which sound more like mediation than an administrative or judicial process for separation. That is to say, the innocent spouse has the power to decide whether the separation is permanent or not. In fact, the *coetus* for the codification of Eastern law described the right of the innocent spouse to separate as a strict right (*strictum ius*), but stated that canon 863 puts in the notion of charity before the strict right for pastoral reasons.[180]

Therefore, like the Latin law, the Eastern law does not clarify whether the act of the ecclesiastical authority in the case of adultery suspends the rights and obligations of marriage, thus constituting a new juridic status for the parties, or whether the act of separation of the innocent spouse is a juridic act which suspends the rights and obligations of marriage. On the one hand, the Eastern Code certainly contains a stronger obligation for the parties to approach the ecclesiastical authority, but on the other hand, the pastoral tone of the canons make it difficult to determine the precise nature of the act of the ecclesiastical authority.[181]

dwelling." The norms contained in this article were taken nearly word for word from article II: *de separatione tori, mensae et habitationis* of the 1917 Code of Canon Law.

178 G. NEDUNGATT (ed.), *A Guide to the Eastern Code: A Commentary on the Code of Canons of the Eastern Churches*, Rome, Pontificio Istituto Orientale, 2002, p. 585.

179 CCEO c. 1357 states, "Any marriage case of a baptized person belongs to the Church by proper right."

180 See *Nuntia*, 15 (1982), p. 93.

181 In discussing the proposed changes to the Eastern law, *Nuntia* records that "The canons 'on separation of spouses' are proposed in a more pastoral way," "*Canones 'de separatione coniugum' modo magis pastorali proponuntur* […]" (*Nuntia*, 10 [1980], p. 15).

Conclusion

In ancient Jewish and Roman law the act of unilateral divorce by a spouse was a juridic act with full legal effects. Even though the Church rejected the possibility of divorce, it established the doctrine that in the case of adultery the innocent spouse could separate from the guilty spouse with the bond of marriage remaining. Certainly, in the early Church this act of separation was accomplished by the innocent spouse's own authority without any required ecclesiastical intervention. As the Church slowly gained jurisdiction over marriage, the competence to effect a separation of spouses was granted to the ecclesiastical authorities and removed from the spouses' own authority. However, there was no universal legislation requiring ecclesiastical intervention in the case of adultery. So, the custom of separation *propria auctoritate* by the innocent spouse was maintained, at least in some localities, despite efforts of individual bishops and councils to penalize this act. The Decretals of Pope Gregory IX, the first universal legislation in this regard, left the question open as to whether separation *propria auctoritate* was permissible by law. Later, the common opinion of learned authors established that this act of private authority was permissible by law, and even established by the evangelical law. Therefore, the innocent spouse could separate by his or her own authority, as long as the adultery of the other party was notorious, and this act would seemingly have enjoyed full juridic effects.[182]

Nevertheless, with the reemergence of civil divorce legislation, the secular authorities rejected canon law. In this new order, the only way for a canonical separation, including one *propria auctoritate*, to obtain full civil effects was for the parties to obtain a civil separation or divorce, unless the civil laws recognized ecclesiastical separations. However, Catholics were prohibited from approaching the civil forum for a divorce. Even when an innocent spouse wanted to obtain the mere civil effects of a divorce for a just reason, this faculty was generally denied. It was not until the twentieth century that Church discipline began to become less restrictive in this area. Vatican II ushered in a significant shift towards the pastoral care of the divorced, and as a result the Church stopped issuing strong prohibitions against civil divorce.

In light of this shift in emphasis, the current law has sought to temper the severity of separation. However, this more pastoral approach has brought with it a certain amount of confusion as to whether the innocent spouse can

[182] Although, as we have seen, it was disputed by learned authors whether such a separation enjoyed juridic effects.

effect a separation *propria auctoritate* in the case of adultery. It seems that the current legislation has attempted to steer a middle ground between the absolute right of the innocent spouse to eject the guilty one from the common conjugal life and the need for mercy and forgiveness mediated by the Church. And yet, this middle road has not clearly taken away the innocent spouse's capacity to effect a separation. In fact, if it is assumed that the innocent spouse no longer enjoys this capacity, then there arises a situation of incompatible rights *ipso iure*. On the one hand, the law gives the innocent spouse the right to separate. On the other hand, the guilty spouse retains all of the rights of marriage. The only way to find an equitable solution to these incompatible rights is to presume that the current legislation grants to the innocent spouse the capacity to suspend the rights and obligations of marriage by the intentional act of separation. Therefore, it can be concluded that the current legislation grants to the innocent spouse, in the case of adultery, the capacity to place a private juridic act suspending the rights and obligations of marriage. However, according to the *CIC* the spouses are obliged to obtain the permission of the diocesan bishop before obtaining a civil divorce, even if the juridic effects of the separation have already been obtained. Therefore, ecclesiastical intervention is always required, and the spouses cannot approach the civil forum on their own.

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THE ORIGINS OF THE SCIENCE OF CANON LAW. GRATIAN AND THE *INARTIFICIOSA ELOQUENTIA*

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SUMMARY — The author links the structure of the Second Part of the *Concordia discordantium canonum* with Gratian's methods of harmonization. While the material of the First and the Third Part were put in order at a later stage, the causes were present in the primitive conception of the work, belonging to the writing project. The first glosses and comments of the decretists explained this rhetorical category. From this data it is possible to appreciate the intellectual atmosphere in which Gratian was trained and educated, the original nucleus of his book, and the links between civil lawyers, theologians and canonists at the beginnings of the twelfth century Renaissance.

RÉSUMÉ — L'auteur établit un lien entre la structure de la deuxième partie de la *Concordia discordantium canonum* et les méthodes d'harmonisation de Gratien. Bien que les matériaux de la première et de la troisième parties ont été organisées à une étape ultérieure, les causes étaient présentes dès la conception de l'œuvre : elles appartiennent à son projet d'écriture. Les premières gloses et les premiers commentaires des décrétistes rendaient compte de cette catégorie rhétorique. Ces données permettent de mieux apprécier l'atmosphère intellectuelle dans laquelle Gratien a été formé et éduqué, le noyau original de son ouvrage, de même que les relations qu'entretenaient les avocats de droit civil, les théologiens et les canonistes à l'orée de la Renaissance du douzième siècle.

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1. It is not possible to understand the origin of Gratian's *Decretum* from the techniques of composition of canonical compilations.[1] Usage turned into a collection the textbook in which circa 1139 an individual[2] explained the teaching of the Holy Fathers on controversial points of ecclesiastical discipline. Gratian faced two challenges: first, rationalising a millenary process of the accumulation of authorities and, second, reconciling this tradition with the reforms that the popes had brought in since Gregory VII's pontificate.[3] The increase in the number of collections since the last quarter of the eleventh century[4] reveals the difficulties encountered by the ecclesiastical authority facing a scenario that required wisdom and prudence. Gratian paved his own path by interpreting and applying canon law by the use of reasons and authorities.

Scholars of the history of canonical sources have stressed this uniqueness of the *Concordia discordantium canonum*. Since the nineteenth century, their attention has been focused, in general, on the tools that Master Gratian used to harmonize *auctoritates*, as well as on his possible models of inspiration. These include the principles of Peter Abelard's *Sic et Non*, the difference between changeable and immutable law established by Ives of Chartres,[5] the rules of Bernold of Constance,[6] and the ways of mercy of Alger of

[1] On the canonical collections, cf. F. MAASSEN, *Geschichte der Quellen und der Literatur des kanonischen Rechts im Abendlande*, Erster Band, *Die Rechtssammlungen bis zur Mitte des 9. Jahrhunderts*, Graz, Leuschner und Lubensky, 1870 = Graz, Akademische Druck- u. Verlagsantstalt, 1956; and P. FOURNIER and G. LE BRAS, *Histoire des collections canoniques en occident depuis les fausses décrétales jusqu'au Décret de Gratien*, 2 vols., Paris, Recueil Sirey, 1931-1932.

[2] From the twelfth century known as the master, monk, or bishop Gratianus. The authorship relies on external witnesses: cf. J. M. VIEJO-XIMÉNEZ, "Graciano," in J. OTADUY, A. VIANA, and J. SEDANO (eds.), *Diccionario general de derecho canónico*, vol. 4, Pamplona, Thomson Reuters Aranzadi, 2012, pp. 239-246. The work only provides anonymous references in D.5 pr., D.15 pr., D.23 pr., D.25 d.p.c.3, D.81 pr., D.101 d.p.c.1 and in C.1 q.7 d.p.c.27.

[3] Cf. S. KUTTNER, *Harmony from Dissonance: An Interpretation of Medieval Canon Law*, Latrobe, Pennsylvania, 1960, pp. 6-9; and IDEM, "Urban II and the Doctrine of Interpretation: A Turning Point?" in *SG*, 15 (1972) pp. 53-85.

[4] Cf. A. M. STICKLER, *Historia iuris canonici latini. Institutiones academicae*, vol. 1, *Historia fontium*, Augustae Taurinorum, Apud Custodiam Librariam Pontif. Athenaei Salesiani, 1950, pp. 160-196. Recent bibliography is found in L. KÉRY, *Canonical Collections of the Early Middle Ages (ca. 400-1140)*, Washington, The Catholic University of America Press, 1999; and in L. FOWLER-MAGERL, *Clavis canonum*, MGH Hilfsmittel 21, Hannover, Hahnsche Buchhandlund, 2005.

[5] Cf. B. BRASINGTON, *Ways of Mercy: The Prologue of Ivo of Chartres*, Münster, Lit Verlag, 2004.

[6] Cf. F. THANER (ed.), *De excomunicationis vitandis* and *De statutis ecclesiasticis sobrie legendis*, MGH *Libelli de Lite Imperatorum et Pontificum saeculis XI. et XII. conscripti*,

Liège[7] – all common subjects on contemporary bibliography. In the context of methods for the interpretation and application of contradictory precepts, the elaboration of reasoning by distinctions has also been highlighted.[8]

The specialized literature has relegated the systematic structure of the work to a secondary level. The *Summa Parisiensis* in the second half of the twelfth century attributed the division into distinctions to Gratian's first disciple, Paucapalea;[9] this gave rise to suspicions that contributed to disconnect the division of the *Concordia discordantium canonum* from the methods of harmonization. Distinction and cause are categories that belong to the liberal arts and have a technical meaning in punctuation and the introduction of periods as well as in the discussion of controversies. The *Decretum* was originally planned as a treatise not only because the author elaborated a discourse with arguments from authority (*capitula* / *auctoritates*) and arguments from reason (*paragrapha* / *dicta*), but also because he imbued the narrative *colore rhetorico*.[10]

2. The division into distinctions of the *Prima* (D.1-D.101) and of the *Tertia pars* (D.1-D.5 *de cons*.) were superimposed on a text that was already written: *hoc opere scripto*, according to a decretist from the second half of the twelfth century.[11] Sometimes the lack of skill is evident, because the resulting sections do not preserve thematic unity. Furthermore, the internal cross references to the chapters of the First Part do not speak of "distinctions."[12] These kinds of distinctions are not related to legal principles, prop-

vol. 2, Hanover, Impensis Bibliopolii Hahniani, 1892, pp. 112-142 and 156-159.

7 Cf. R. KRETZSCHMAR, *Alger von Lüttichs Traktat "De misericordia et iustitia »: Ein kanonistischer Konkordanzversuch aus der Zeit des Investiturstreits*, Quellen und Forshungen zum Recht im Mittelalter, Band 2, Sigmaringen, Jan Thorbecke Verlag, 1985.

8 Cf. CH. MEYER, *Die Distinktionstechnik in der Kanonistik des 12. Jahrhunderts: Ein Beitrag zur Wissenschaftsgeschichte des Hochmittelalters*, Medievalia Lovaniensia, Series I, Studia XXIX, Leuven, Leuven University Press, 2000, pp. 144-177.

9 Cf. F. MAASSEN, *Paucapalea: Ein Beitrag zur Literaturgeschichte des kanonischen Rechts im Mittelalter*, Vienna, K. K. Hof- und Stattsdruckerei, 1859, p. 19; and T. P. MCLAUGHLIN (ed.), *The Summa Parisiensis on the Decretum Gratiani*, Toronto, Les Presses Universitaires Laval, 1952, pp. x and 1.

10 Stephan of Tournai used the expression in his comments to C.1 q.7 d.p.c.7 (J. F. VON SCHULTE [ed.] *Stephan von Doornick [Étienne de Tournai, Stephanus Tornacensis]. Die Summa über das Decretum Gratiani*, Giessen, 1891 = Aalen, Scientia Verlag, 1965, p. 157).

11 The summa *Antiquitate et tempore*: cf. MAASSEN, *Paucapalea*, pp. 9-10.

12 Cf. F. GILLMANN, "Rührt die Distinktioneneinteilung des ersten und des dritten Dekretteils von Gratian selbst her?" in *AkK*, 112 (1932) pp. 504-533; and A. VETULANI, "Über die Distinktioneneinteilung und die Paleae im Dekret Gratians," in *Zeitschrift der Savigny Stiftung für Rechtsgeschichte. Kanonistische Abteilung*, 23 (1933), pp. 346-370. Cf. also

ositions, or dispositions.[13] Instead, they seem to be close to the *positurae* (punctuated clauses), that is, the grammatical rules that mark out the parts of a speech: the *subdistinctio* (low point, or comma), the *distinctio media* (middle point, or colon) and the *distinctio ultima* (high point, or period).[14] The distinctions of the *Decretum* would mark the completion of a sentence – *plena sententiae clausula*, separate from the following *integra sententia*[15] – although they surpassed the usual limit: "Periodos autem longior esse non debet quam ut uno spiritu proferatur" ("a sentence should not be longer than what may be delivered in one breath").[16] This type of distinction has nothing to do with the methods of the interpretation and application of canon law.

The same decretists who were questioning the division into distinctions were clear about the original structure of the Second Part and who the author was. In the opinion of the summa *Antiquitate et tempore*, "[Paucapalea] Secundam partem non distinxit quia a magistro Gratiano sufficienter distincta est per causas, thematha, quaestiones."[17] While the material belonging to the First and Third Part was put in order at a later stage, the Second Part was written in the form of causes (*causae*). The causes were in the primitive conception of the work, that is, in the project or plan of the work. As they have been attributed to Gratian from the twelfth century, they play a relevant role in the search for the *Ur-Gratian*. Gratian wanted to harmonize the tradition and the principles of the reform based on the causes, not on the distinctions. The causes precede the methods he used for the interpretation and application of contradictory canonical authorities.[18]

Gratian's *dicta* refer to distinct types of causes. The type that is more similar to the notion offered by modern manuals – judicial actions that give rise to questions[19] – is only indirectly related to the systematic division of the *Decretum*. The starting point of Gratian's efforts to achieve "harmony from dissonance" are the causes of the *artificiosa eloquentia*. The first decretists explained this category in their glosses and comments on the

J. M. VIEJO-XIMÉNEZ, " 'Costuras' y 'descosidos' en la versión divulgada del Decreto de Graciano," in *IE*, 21 (2009) pp. 133-154.

13 As explained in STICKLER, *Historia*, pp. 208-209.

14 ISIDORE OF SEVILLE, *Etymologiarum sive Originum libri XX*, 1.20.1-2.

15 Ibid., 1.20.5.

16 Ibid., 2.18.2.

17 MAASSEN, *Paucapalea*, p. 9.

18 These methods include reasoning by distinctions, a different method from the compilation of paragraphs. Cf. J. M. VIEJO-XIMÉNEZ, "Distinctiones," in J. OTADUY, A. VIANA, and J. SEDANO (eds.), *Diccionario*, vol. 3, pp. 424-428.

19 Cf. STICKLER, *Historia*, pp. 208-209.

Decretum. This fact offers some clues about the intellectual ambiance in which Gratian was formed, on the original nucleus of the *Concordia discordantium canonum*, as well as on the relations among legists, theologians, and canonists in the intellectual rebirth of the twelfth century.

3. Roman law was familiar with different kinds of cases, primarily in the sphere of lawsuits and accusations. The Curiana case, in 93 B.C., confronted L. Licinius Crasus versus Q. M. Scaevola on the interpretation of a will.[20] In the language of the civil proceeding, the *causae collectio* or *conjectio* consisted of a brief summary of the case that the parties presented before the judge at the beginning of the process (*in iudicio*). Gaius explained that in the system of the *legis actiones*, once the *collectio* had been completed, the instruction took place.[21] In the formulary procedure, the *causae collectio* tends to be confused with the exordium of the plaintiffs, so that it forms part of the *oratio perpetua*, or *continua* or *actio*.[22] The law of the Low Empire distinguished between civil (pecuniary) cases and criminal cases.[23]

In some *dicta* of the *Secunda pars* of the *Decretum*, *causa* is used to refer to a civil or criminal action.[24] In the resolution of the case against a bishop accused of a crime against the flesh (C.2 pr.), the testimony of three of the proposed witnesses was missing. A bishop who was expelled from his see was brought to trial (C.3 pr.), which raises the problem of whether or not it was possible to ask for his temporary suspension once the summons had been issued (C.3 q.3). C.4 q.2 asks whether or not a minor under fourteen could be a witness in a criminal case. Other questions include the number of times a slandered bishop who cannot be present on the date fixed for the trial (C.5 pr) has to be called before the judgement is issued (C.5 q.2) and whether or not he can be represented by a procurator (C.5 q.3). The distinction between civil and criminal cases appears in several *dicta* of C.11 q.1 which discuss whether a cleric can be brought before a civil court: the ban and the subsequent penalty set by Pope Boniface I (C.11 q.1 c.8)[25] covered both civil and criminal cases as well as civil and military judges. Gratian

[20] Cf. CICERO, *De Oratore*, 2.24, 2.221 and *De inventione*, 2.42.122; and *Dig*. 28.6.4.

[21] Cf. GAIUS, *Institutionum commentari quattuor*, 4.15; and *Dig*. 50.17.1.

[22] Cf. G. HUMBERT, "Causae collectio," in C. DAREMBERG and E. SAGLIO (eds.) *Dictionnaire des antiquités grecques et romaines*, vol. I.2, Paris, Librairie Hachette, 1877, p. 975.

[23] Cf., for example, *Nov*. 8.6, *Nov*. 28.3, *Nov*. 31.3, *Nov*. 123.8 and *Nov*. 134.2.

[24] In D.20 pr., *causa* is a controversy whose solution is referred to someone who has *potestas*. The introduction to D.20 uses *negotium* as a synonym of *causa*. *Negotium* is also synonymous of *causa* in C.2 q.6 d.p.c.10, C.2 q.6 d.p.c.37, C.6 q.4 d.p.c.2 and in C.11 q.1 d.p.c.47.

[25] *Bonifatius I* JK+358. The falsification is dealt with in J. M. VIEJO-XIMÉNEZ, "Las Novellae de la tradición canónica occidental y del Decreto de Graciano," in L. LOSCHIAVO, G. MANCINI, and C. VANO (eds.), *Novellae Constitutiones. L'ultima legislazione di Giustiniano tra*

uses the civil case / criminal case distinction in d.p.c.30, in d.p.c.31 and at the end of C.11 q.1 in d.p.c.47. The prohibition of resolving cases on Sundays is analyzed in C.15 q.4.

Causa and *quaestio* appear in C.13 pr., which sets out a dispute over tithes. The clerics of the baptismal church sued the clerics of the diocese where some war victims had taken refuge but who nevertheless were cultivating the land from which they had escaped. The expression *quaestionem mouere* appears in the introduction to C.7 and to C.14 with the same meaning, while C.11 pr. uses the equivalent *quaestionem agitare*. In the paragraphs of the *causae* of the Second Part of the *Decretum*, *quaestio* is never a tribunal [26] and only rarely means investigation or interrogation.[27]

Gratian was familiar with the *causae* and questions of Roman trials. That said, not all the *causae* of the Second Part of the *Concordia discordantium canonum* are actions, that is, *causae* or *quaestiones* in the sense mentioned. On the contrary, they all follow the pattern of the *quaestiones* submitted to the opinion of a jurist or to a hypothesis or cases that the jurist presents. Their structure is characteristic of the hypothetical or real controversies that demand the *responsio* of a prudent man.[28] But this does not mean that the *libri quaestionum / disputationum* of the classical jurists or that the fragments *antiquorum prudentium libros* systematically compiled by Tribonian at the suggestion of Justinian were the sources of inspiration for the *causae* of Gratian.[29]

The *causae* and the *quaestiones* of the *Concordia discordantium canonum* are more than just the indications in the margins of the copies from the second half of the twelfth century. A reading of the work corroborates the claims of *Antiquitate et tempore* on the original character of the organization of the Second Part. While the First and the Third Parts are meaningful without being divided into distinctions, the *Secunda pars* was composed in the form of *causae* and *quaestiones*. Internal cross references allude to these sections with the word *causa* and identify them by theme (C.1, C.2 q.7, C.13), by the initial words (C.3, C.5, C.9, C.11, C.17, C.24, C.33), or by the

Oriente e Occidente. Da Triboniano a Savigny, Naples-Rome, Edizioni Scientifiche Italiane, 2011, pp. 218-220.

[26] Roman law was familiar with the *Quaestiones extraordinariae* from 413 B.C. The law of Calpurnio Piso, *De pecuniis repetundis* of 149 B.C., established the *Quaestiones perpetuae*. Cf. *Dig*. 1.2.2.32 with the list of *Quaestiones publicae* laid down by *Cornelius Sulla*.

[27] In C.15 pr. Cf. titles *Dig*. 48.18 and *Cod. Just*. 9.4.

[28] For instance, the *quaestio domiciana*. Cf. *Dig*. 28.1.27.

[29] As suggested by H. KANTOROWICZ and W. BUCKLAND, *Studies in the Glossators of the Roman Law: Newly Discovered Writings of the Twelfth Century*, Cambridge, Cambridge University Press, 1938 = Aalen, Scientia Verlag, 1969, p. 82.

topic, like a rubric (C.1, C.13, C.16, C.23). Before the *Concordia discordantium canonum*, never had anyone used cases (*causae*) to harmonize canons.[30]

4. Two paragraphs (*dicta*) of the *Decretum* offer an orientation to the notion of *causa* that is more precise than what follows from an analysis of each one of the *causae*. They both fulfill the role of *transitiones*.[31] The d.p.c.1 of D.101 marks the passage from the First to the Second Part of the work.[32]

D.101 d.p.c.1 (*edF* 356.14-20)

> Hactenus de electione et ordinatione clericorum tractauimus. Nunc ad symoniacorum ordinationes transeamus et ut facile liqueat quid super hac heresi sanctorum Patrum decreuit auctoritas causa deducatur in medium cuius negotium et de scienter a symoniacis ordinatis et de ignoranter a symoniacis consecratis et de ordinationibus que per pecuniam fiunt contineat.

Like other paragraphs, d.p.c.1 announces a change of topic[33]: "Up until now, we have dealt with the selection and ordination of clerics. Now we will pass on to the ordinations of the simoniacs ...." The following indication confers on the passage a unique character: "... and in order to clarify more easily what the authority of the holy Fathers established on this heresy, [it] may set out in the sight of all a cause whose supposition of fact includes ...." The author reveals his method of composition. He does not consider it worth explaining what a cause is, a tool that he uses to pose some abstract problems: "... those who are consciously ordained by simoniacs, those who are unknowingly consecrated by simoniacs, and the ordinations conferred for money." In this passage, *negotium* is not synonymous of *causa* / action / procedure.[34] The summa *Quoniam in omnibus* uses *causa* and *negotium* in

[30] Alger's paragraphs are similar to the *dicta* of the First Part of the *Concordia discordantium canonum*. Cf. KRETZSCHMAR, *Alger*, pp. 141-154 and 187-375.

[31] Cf. Stephan of Tournai's comments on D.101 d.p.c.1 and on C.1 q.7 d.p.c.27 (SCHULTE [ed.] *Stephan*, pp. 120 and 157).

[32] Cf. E. FRIEDBERG (ed.), *Corpus Iuris Canonici, editio Lipsiensis secunda post Aemilii Ludouici Richteri curas ad librorum manu scriptorum et editionis Romanae fidem recognouit et adnotatione critica instruxit*, vol. 1, Leipzig, B. Tauchnitz, 1879 = Graz, Akademische Druck- u. Verlagsanstalt, 1959 (= *edF*).

[33] D.101 d.p.c.1 is of special interest for the *Redaktionsgeshichte*. Cf. C. LARRAINZAR, "El Decreto de Graciano del códice Fd (= Firenze, Biblioteca Nazionale Centrale, Conventi Soppressi A.I.402). In memoriam Rudolf Weigand," in *IE*, 10 (1998) pp. 450-451.

[34] Cf. *supra* fnt. 24. Paucapalea (?) used this sense of *negotium* to comment on C.1 q.4 d.p.c.12: cf. J. F. v. SCHULTE (ed.), *Die Summa des Paucapalea über das Decretum Gratiani*, Giessen, 1890 = Aalen, Scientia Verlag, 1965, p. 55. On the authorship of the summa

the same way as D.101 d.p.c.1.[35] Some commentaries on Cicero's *Rhetorica prima* (*De inventione*) from the first half of the twelfth century explained that *negotium* is the words or deeds of a person that give rise to a *causa*.[36] Therefore, the *causa* / *negotium* of D.101 d.p.c.1 is a rhetorical category.

The second paragraph closes the treatise on simony (C.1) and proposes new topics related to procedures.

C.1 q.7 d.p.c.27 (*edF* 438.4-12)

> His breuiter premissis ad ea ueniamus que ecclesia seueritate discipline parata est ulcisci ostendentes quibus accusantibus uel testificantibus quilibet sint conuincendi, quo iudice quisque debeat dampnari uel absolui, si causa uiciata fuerit quo remedio possit subleuari, si accusatores defecerint an reos sit cogendus ad purgationem. Et ut facilius pateat quod dicturi sumus exemplum ponatur sub oculis in quo auctoritates hinc inde controuersantes distinguantur et quid sanctorum Patrum sentiat auctoritas liquido intimetur.

The text follows a similar pattern: a systematic advertence that is complemented with another on the methodology for the discussion. The expression *causa uiciata* corresponds to the action / process, not to the *causae* of the *Concordia discordantium canonum*. The d.p.c.27 of C.1 q.7 is differentiated from the d.p.c.1 of D.101 because it speaks of *exemplum*: "And to highlight more easily what we are going to say, let us give an example in which one can distinguish the authorities who dispute from both sides and know clearly the meaning of the holy Fathers." Many *dicta* of the *Decretum* turn to *exempla* as arguments which show the probability of something through the use of analogy.[37] These examples contradict or confirm a fact by means of the

Quoniam in omnibus, cf. J. M. VIEJO-XIMÉNEZ, "La *Summa Quoniam in omnibus* de Paucapalea: una contribución a la historia del Derecho romano-canónico en la Edad Media," in *Initium*, 16 (2011) pp. 27-74 (= *Folia Canonica et Theologica*, 1 [2013] pp. 151-196); and J. M. VIEJO-XIMÉNEZ, "Una composición sobre el Decreto de Graciano: la suma *Quoniam in omnibus rebus animaduertitur* atribuida a Paucapalea," in *Helmantica*, 190 (2012) pp. 419-473.

[35] For instance, in its comments on C.15 pr., C.20 pr., C.22 pr., C.23 pr., C.24 pr., C.25. pr., C.26 pr., C.27 pr., C.31 pr., C.33 pr. and on C.36 pr. (SCHULTE [ed.], *Die Summa*, pp. 84, 94, 96, 99, 104, 106, 108, 111-112, 124, 130 and 142).

[36] Cf. Thierry of Chartres' explanation of the common places of the *De inventione*, 1.24.34 in K. M. FREDBORG (ed.), *The Latin Rhetorical Commentaries by Thierry of Chartres*, Toronto, Pontifical Institute of Mediaeval Studies, 1988, p. 128, nos. 28-31. Boethius was the source of Thierry's inspiration (ibid., nos. 29-31).

[37] Cf. D.50 d.p.c.12, D.50 d.p.c.52, D.56 d.p.c.1, D.61 d.p.c.8, D.63 d.p.c.25, D.91 pr., C.1 q.1 d.p.c.22, C.2 q.3 d.p.c.26, C.2 q.7 d.p.c.39, C.2 q.7 d.p.c.40, C.2 q.7 d.p.c.41, C.2 q.7

authority or the experience of persons – usually, the protagonists of biblical stories – or indeed the result of similar occurrences.[38] The *exemplum* mentioned in d.p.c.27 of C.1 q.7, however, is related to the notions of *causa* and *negotium* of D.101 d.p.c.1. The indistinct use of *causa* / *exemplum* – as well as that of *causa* / *negotium* / *thema* – is also encountered in the medieval commentators on Cicero, whose remote source of inspiration is Marius Victorinus.[39]

In sum, according to D.101 d.p.c.1 and to C.1 q.7 d.p.c.27, the *causae* of the *Decretum* are rhetorical *causae*. The genius of Master Gratian lay in his designing thirty-six *causae* / *negotia* / *exempla* that condensed abstract problems on which the authorities of the first millennium differed and which concerned the reform agenda promoted by the popes since Gregory VII. Stephan of Tournai emphasized the "rhetorical colour" of the first manual of canon law. He was probably not the first decretist to link the composition of the *Decretum* with the Rhetoric.

5. Twelfth century manuscript glosses explained the notion of *causa*. Some of these glosses precede the first stage of gloss composition that dates back to the 1150s.[40] The *Exserpta ex Sanctorum Patrum* of Sankt Gallen, Stiftsbibliothek, 673 (Sg), for instance, gives a short *Concordia discordantium canonum* with thirty-three *causae*. The marginal annotation to C.1 (incipit: *Laicus quidam literatus*) [41] says:

Sg fol. 3[rb] marg.

> Causa est res que habet in se controuersiam in dicendo positam cum certarum personarum interpositione.

d.p.c.42, C.2 q.7 d.p.c.43, C.2 q.2 d.p.c.8, C.4 q.3 d.p.c.3, C.6 q.1 d.p.c.21, C.8 q.1 pr., C.9 q.3 d.p.c.3, C.13 q.2 d.p.c.3, C.17 q.4 d.p.c.42, C.17 q.4 d.p.c.43, C.22 q.2 d.p.c.18, C.22 q.3 pr., C.22 q.3 d.p.c.23, C.23 q.3 pr., C.23 q.4 d.p.c.30, C.23 q.8 d.p.c.28, C.24 q.3 pr., C.26 q.2 pr., C.27 q.2 d.p.c.26, C.32 q.4 pr., C.32 q.4 d.p.c.2:, D.1 d.p.c.60 *de pen*., D.1 d.p.c.87 *de pen*., D.3 d.p.c.43 *de pen.* and C.35 q.1 pr.

38 Cf. CICERO, *De inventione*, 1.30.49.

39 Cf. the comments of Thierry of Chartres on the *De inventione*, 1.12.16 and 2.17.53 (FREDBORG [ed.], *The Latin*, 100.97-99 and 182.1-3, 100 fnt. 98 and 182 fnt. 1-3).

40 Cf. R. WEIGAND, *Die Glossen zum Dekret Gratians: Studien zu den frühen Glossen und Glossenkompositionen*, *Studia Gratiana* 25-26, Rome, Libreria Ateneo Salesiano, 1991, pp. 401-425; and R. WEIGAND, "The Development of the *glossa ordinaria* to Gratian's Decretum," in W. HARTMANN and K. PENNINGTON (eds.), *The History of Medieval Canon Law in the Classical Period, 1140-1234. From Gratian to the Decretals of Pope Gregory IX,* Washington, The Catholic University of America Press, 2008, pp. 55-97.

41 Cf. C. LARRAINZAR, "El borrador de la 'Concordia' de Graciano: Sankt Gallen, Stiftsbibliothek MS 673 (= Sg)," in *IE*, 11 (1999) p. 621.

The definition follows from Cicero's *De inventione*:

> For Hermagoras, indeed, appears neither to attend to what he is saying, nor to understand what he is proposing when he divides the matter of oratory into specific causes and general questions. He defines the specific causes as those that imply a dialectical confrontation in which determined persons intervene; also I recognize them as proper to the orator, for I have attributed the three parts already mentioned – the judicial, the deliberative, and the demonstrative. By general questions he understands the dialectical confrontation in which no concrete persons are mentioned ....[42]

Cause is the *hypothesis* or *quaestio finita* as opposed to the *thesis* or *quaestio infinita*[43] which, according to Marcus Tulius, "has nothing to do with the function of the orator."[44]

The author of the Sg gloss could have taken the definition from one of the medieval commentators on the *Rhetorica prima*. Thierry of Chartres, for example, repeated it twice in his *Ut ait Petronius*, composed in the 1130s: first in the introduction and then in the explanation of *De inventione* 1.6.8.[45] In any case, the first marginal annotation of the *Exserpta* links the *causa Laicus quidam literatus* with the causes of the *Rhetorica*, not with the causes / actions / processes. The advertence is contemporaneous with the copy of this version of the *Concordia discordantium canonum*, for it is attributed to the "marginal hand 1," which coincides with the "principal hand 2" of the Swiss Codex.[46] That the *Exserpta* are organized into causes and that its first gloss gives the rhetorical definition of "cause" is something more than a happy coincidence. Sg could be the only testimony of the original structure of the *Decretum*.

6. Thirty-one manuscripts with the first stage of gloss composition offer an expanded version of the Sg marginal note.[47] At this stage, the gloss to C.1 – now with the incipit *Quidam habens filium* – has two parts: the enumeration of four types of causes and the definition of Hermagoras / Cicero. The text could have been prepared in the same circle as Gratian's since it appears in

[42] CICERO, *De inventione*, 1.6.8.

[43] Cf. IDEM *De partitione oratio*, 61; *De oratore*, 1.31.138; and *Topica*, 79.

[44] IDEM, *De inventione*, 1.6.8.

[45] Cf. FREDBORG (ed.), *The Latin*, 51.57-52.1 and 74.19-26.

[46] Philipp Lenz (Sankt Gallen) facilitated his description of the hands of manuscript 673.

[47] This gloss was edited by R. WEIGAND, "Die ersten Jahrzehnte der Schule von Bologna: Wechselwirkung von Summen und Glossen," in P. LANDAU and J. MÜLLER (eds.), *Proceedings of the Ninth International Congress of Medieval Canon Law*, Monumenta Iuris Canonici C-10, Libreria Editrice Vaticana, 1997, p. 451.

one of the old manuscripts of the *Concordia discordantium canonum*, the manuscript Barcelona, Archivo de la Corona de Aragón, Ripoll 78 (Bc).[48]

Bc fol. 97^{vb} marg.

> Causarum alia dicitur iudicium alia iustitia alia negotium alia lis. Causa est res que habet in se contoruersiam in dicendo positam cum certarum personarum interpositione.

The categories *iudicium*, *iustitia*, *negotium* and *lis* appear in the *Etymologiarum sive Originum libri XX*, an encyclopaedia that played a leading role in the making of D.1-D.20.[49] Isidore of Seville explained:

> A forum (forus / forum) is a place for holding trials, (…) The "legal forum" (forus) moreover consists of the complaint, the law, and the judge. A complaint (causa) takes its name from the "event" (casus) from which it arives. The complaint is the basis and origin of a proceeding [negotium], not yet openend up for trial and examination. When it is put forward it is a complaint [causa], when it is examined it is a trial [iudicium], when it is finished, it is the judgment [iustitia].[50]

The *Rhetorica* connects *causa* and *negotium*. The consideration of the *causa* as one of the elements of the forum would seem characteristic of *iurisprudentia*, but it is also of interest to *artificiosa eloquentia*. Cicero noted that Aristotle

> ... thought that the function of the orator was developed in three classes of matters: the demonstrative, the deliberative, and the judicial; [...] the judicial, used in courts, implies accusation and defence, or petition and response.[51]

If the author of the Sg gloss was familiar with the Bc gloss, it would be difficult to explain why he eliminated the categories *iudicium*, *iustitia*, *negotium*, (*iurgium*) and *lis*. Since the *Exserpta* lacked the treatise on laws (D.1-D.20), compiled from the Ethimologies of Isidore of Seville, the short version of the marginal comment seems to be earlier. Not all the

[48] On the Bc glosses, cf. WEIGAND, *Die Glossen*, pp. 686-687. In 1997, when Weigand edited the gloss to C.1 ("Die ersten"), Bc was considered an abbreviation of the *Decretum*.

[49] This could be an argument in favour of the antiquity of the Bc gloss. Civil lawyers and decretists were consulting the *Etymologiarum*. Cf. L. LOSCHIAVO, "L'impronta di Isidoro nella cultura giuridica medievale: qualche exempio," in G. BASSANELLI and S. TAROZZI (cur.), *Ravenna Capitale. Uno sguardo ad Occidente. Romani e Goti—Isidoro di Siviglia*, Santarcangelo di Romagna, Maggioli Editore, 2012, pp. 44-55.

[50] S. A. BARNEY, W. J. LEWIS, J. A. BEACH, and O. BERGHOF (trans.), *The Etymologies of Isidore of Seville*, Cambridge, Cambridge University Press, 2006 (= *Etymologiarum*, 18.15.1-2).

[51] CICERO, *De inventione*, 1.5.7. Cf. also *De inventione*, 1.8.10-11.15.

manuscripts of the first stage of gloss composition include a clarification like that of Bc, so it cannot reliably be traced to the 1150s.[52] An earlier date is conceivable. Both the Sg version and the Bc version are close to Gratian. The rhetorical notions not only are detectable in the interior of the *Concordia discordantium canonum* – in D.101 d.p.c.1 and in C.1 q.7 d.p.c.27 – but also in the comments dating from the time of the work's composition. Was the marginal note from the *De inventione*, or from one of its commentators, an indication of Gratian?

7. According to the summa *Quoniam in omnibus*, the Second Part of the *Concordia discordantium canonum* is a succession of disputes "cum personarum interpositione". The explanation of the summa on C.1 (incipit: *Quidam habens filium*) used materials that were circulating among the decretists close to Gratian. The modern editor did not identify these parts. His text is used below and is completed with its sources.[53]

SQO ad C.1 (Schulte 51.2-24)

> Hucusque de clericorum electione et ordinatione tractatum est. Set quia in ordinatione sive electione peccatum symoniae quandoque committitur, ideo symoniacorum causam, quae prima est, non incongrue secundo loco ponit. Cuius negotium et de scienter a simoniacis ordinatis et de ignoranter a simoniacis consecratis et de ordinationibus que per pecuniam fiunt, continet.
>
> Ceterum quia causarum alia iudicium, alia iustitia, alia negotium, alia iurgium, alia lis vocatur, horum uniuscuiusque vocabulorum definitionem utile existimo ignorantibus aperire.
>
> Causa est res habens in se controversiam in dicendo positam cum certarum personarum interpositione.

[52] WEIGAND, "Die ersten," p. 451. Weigand did not know about the Sg gloss or its relationship with *De inventione*. Neither did he realize that the *Etymologiarum* could be the source of inspiration for the sort of causes of Bc.

[53] Cf. SCHULTE (ed.), *Die Summa*, p. 51. An edition of the commentary is in VIEJO-XIMÉNEZ, "Una composición," pp. 454-455.

Aliter causa est impulsus animi ad aliquid agendum.

Causa vocata a casu qui evenit. Est enim materia et origo negotii necdum discussionis examine facta. Quae dum proponitur causa est, dum discutitur iudicium est, dum firmatur, iusticia est. Vocatum autem iudicium quasi iuris dictio, et iustitia quasi iuris status.

Negotium uero multa significat, modo actum rei alicuius, cui contrarium est otium, modo actionem causae, quod est iurgium litis. Et dictum negotium, quod sit sine otio. Negotium autem in causis, negotium in commerciis dicitur, ubi aliquid datur, ut maiora lucrentur.

Iurgium dictum quasi iuris garrium, eo quod hi qui causam agunt, iure disceptant.

Lis a contentione limitis nomen sumpsit, de qua Virgilius: Limes erat positus litem ut disceret agri.

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de clericorum electione et ordinatione : *ex* D.101 d.p.c1 *Cuius negotium — fiunt continet* : *ex* D.101 d.p.c.1 *Causa est — personarum interpositione* : *De inventione*, 1.6.8? Thierry of Chartres, 74.18-29? *Aliter causa — aliquid agendum* : Thierry of Chartres, 60.30-31 *Causa vocata — disceret agri* : *ex Etymologiarum*, 18.15.2-4

The summa *Quoniam in omnibus* connects the distinctions (the *Prima pars*) and the causes (the *Secunda pars*) with words taken from D.101 d.p.c.1.[54] It labels C.1 as *symoniacorum causa*, says that it is the first, and affirms that it occupies the second place in the *Decretum*. It then repeats the categories of Isidore of Seville, which appeared in the first part of the gloss of Bc. The meaning of each one is explained in the first person singular. First of all, the speaker copies the definition of Hermagoras / Cicero from the glosses of Sg and Bc. He then provides a new sense of the word *causa*, the origin of which is also from the *Rhetorica*. In his *commentum* on the *De inventione*, Marius Victorinus stated that "Aliter causa est impulsus animi ad aliquid agendum."[55] Finally, the summa *Quoniam in omnibus* copies the paragraphs of the Etymologies corresponding to the different stages of a cause: *iudicium*, *iustitia*, *negotium*, *iurgium* and *lis*.

[54] The summa *Quoniam in omnibus* used D.101 d.p.c.1 to comment on C.2 (SCHULTE [ed.], *Die Summa*, p. 57.4-6).

[55] C. HALM (ed.), "Q. Fabii Laurentii Victorini. Explanationes in Rhetoricam M. Tullii Ciceronis libri duo, " in *Rhetores latini minores*, Lipsiae, in Aedibus B. G. Teubneri, 1863, p. 160.

The summa *Quoniam in omnibus* is a composition of the 1150s.[56] It contains teachings of Gratian, Paucapalea, and other decretists. The author used the notions of *causa* / *negotium* / *thema*.[57] When introducing C.1, he drew on his knowledge of *Rhetorica*. Although the remote origin of the definition *impulsus animi ad aliquid agendum* – unknown in the early stages of the glosses to the *Decretum* – is the rhetor Victorinus, the author of the summa *Quoniam in omnibus* could have consulted Thierry's *Ut ait Petronius*.[58] This would not be the only time that he was inspired by the master from Paris and Chartres. *Ut ait Petronius* provided him with material for the prologue of his explanation of the *Decretum*, for instance, the affirmation *artis rhetoricae materia est hypothesis*,[59] originally from Boethius.[60]

Gratian, his collaborators, and his disciples employed tools from the *artificiosa eloquentia*. The first manual of canon law does not depend on the *Digestum* or on the teaching movement, more or less institutionalized and located in Bologna from the end of the eleventh century on.[61] Liberal arts, the backbone of education during the Middle Ages, influenced the design of the original structure of the work. However, when Gratian tried to harmonize contradictory authorities about abstract problems (*thesis* or *quaestio infinita*), suggested in his causes (*hypothesis* or *quaestio finita*), he did not resort to the topic of legal controversies[62] but to the rules for the interpretation and application of the canons that had been used by Ives of Chartres and Alger of Liège.

[56] WEIGAND, "Die ersten," p. 451, conceded chronological priority to the summa *Quoniam in omnibus* rather than the first stage of gloss composition since, in the margins of some manuscripts of the *Decretum*, the earlier stratus of glosses combined extracts from the summa with glosses from the first stage, while the vast majority of the glosses of this stage were copied in later strata. If one considers how the summa *Quoniam in omnibus* was written, the opposite process would also be logical.

[57] Cf. *supra* fnt. 34.

[58] Cf. FREDBORG (ed.), *The Latin*, 60.30-32.

[59] Cf. SCHULTE (ed.), *Die Summa*, p. 3.19

[60] Cf. FREDBORG (ed.), *The Latin*, 51.57-58 and fnt. 57.

[61] However, Gratian was familiar with Roman Law. Cf. VIEJO-XIMÉNEZ, "Las Novellae," and J. M. VIEJO-XIMÉNEZ, "Un capítulo del *Authenticum* boloñés en la *Concordia discordantium canonum*," in L. BERKVENS, J. HALLEBEEK, G. MARTY, and P. NÈVE (eds.), *Recto ordine procedit magister: Liber amicorum E. C. Coppens*, Brussels, Wetenschappelijk Comite voor Rechtsgeschiedenis Koninklijke Vlaamse Academie van Belgie voor Wetenschappen en Kunsten, 2012, pp. 313-329.

[62] Cf. Cicero, *De inventione*, 2.23-39.69-115 and 2.40.116-50.156.

8. Both the *De inventione* and the *Rhetorica ad Herennium* dominated eloquence training until the eleventh century.[63] The interest in the relationship between rhetoric and dialectic placed the accent on the revision of the topics and weakened the tradition of the commentaries on Cicero.[64] However, in the first half of the twelfth century, some Parisian teachers put forward their ideas on the office of the orator by means of a reading of the *Rhetorica prima* and the *Rhetorica secunda* aimed at drawing up definitions.[65]

William of Champeaux (c. 1070-1121), a professor in Paris from 1100,[66] composed the commentary *In primis*.[67] He distinguished *artificiosa* from *inartificiosa* eloquence. The first is proper to orators who debate with arguments. The second is proper to jurists who turn to laws. But, according to the teacher of Peter Abelard, a jurist "potest tamen usurpare alienum officium quod est oratorum utendo argumentis in disceptationibus suis."[68] This same William, consecrated bishop of Châlons-sur-Marne in 1113, attracted attention with his speeches in the councils of Beauvais (1114), Soissons (1115), Châlons (1115), Reims (1115), Reims (1120) and Soissons (1120). His biographers consider him one of the protagonists in the transformation of the *ius ecclesiasticum* into a system of rational activity. He inaugurated a scholastic method for the application of canons that did not go unnoticed among his contemporaries.[69] In Paris and in the North of France, the relationship between rhetoric and canon law was forged in the classrooms and resulted in a generation of teachers and learned men dedicated to the government of the Church.

Thierry (ca. 1085-ca. 1155), archdeacon and chancellor of Chartres, juggled his ecclesiastical duties with teaching in Paris during the 1130s and

[63] This was under the influence of the *De doctrina christiana* by Augustine. Cf TH. CONLEY, *Rhetoric in the European Tradition*, Chicago, University of Chicago Press, 1990, p. 78. On the diffusion of the *De inventione*, cf. B. MUNK OLSEN, "La réception de la litérature classique grecque et latine du IXe au XIIe siècle. Une étude comparative," in *Classica*, 19 (2006) pp. 167-179.

[64] CONLEY, *Rhetoric*, pp. 72-73.

[65] Cf. CONLEY who talks about a rennaisance of the Ciceronian studies (in ibid., p. 100).

[66] Cf. CH. DE MIRAMON, "Quatre notes biographiques sur Guillaume de Champeaux," in I. ROSIER-CATACH (ed.), *Arts du langage et théologie aux confins des XIe-XIIe siècles: textes, maîtres, débats*, Turnhout, Brepols, 2011, pp. 72-80.

[67] Before 1118, according to K. M. FREDBORG, "The commentaries on Cicero's *De inventione* and *Rethorica ad Herennium* by William of Champeaux," in *Cahiers de l'Institut du Moyen Âge Grec et Latin*, 17 (1976), pp. 5 and 12-14. Cf. K. JACOBI, "William of Champeaux. Remarks on the Tradition in the Manuscripts," in ROSIER-CATACH (ed.), *Arts*, pp. 261-271.

[68] FREDBORG, "The Commentaries," pp. 27-28.

[69] Cf. DE MIRAMON, "Quatre notes," p. 70.

1140s.[70] He wrote a commentary on *De inventione*, whose prologue starts with the words *Ut ait Petronius* and whose main sources were Boethius, Victorinus, and Horatius. Thierry used the commentaries of Manegold and of his disciple, William of Champeaux. In turn, *Doctor Carnotensis* influenced *Petrus Helias*, *Alanus*, Matthieu, *Dominicus Gundissalinus* and Ralph de Longchamp.[71] Thierry's teachings also left a mark on the decretists, for instance, on the author of the summa *Quoniam in omnibus*. The relationship between rhetoric and canon law resulted in a new science.[72]

Conclusion

Gratian did not aim to persuade anybody with words.[73] He wrote the *Concordia discordantium canonum* with a different purpose: "ipsa decreta ordinare et in superficie dissonantia ad concordiam revocare."[74] Given that he combined reasons and authorities, he usurped the office of the orator. He understood *inartificiosa eloquentia* in a particular way, as he did not observe the rules of the *topica*.[75] However, he utilized the *causae* of the *artificiosa eloquentia* in order to write what was, probably, the original nucleus of his book. The science of canon law owes more to Cicero and his medieval commentators than to the classical Roman lawyers, to Irnerius or to the four Doctors. The intellectual atmosphere in which the methods of the *ius canonicum* were born is the same as that which renewed the exegesis of the *sacra pagina* and the exposition of theology.[76] In the early twelfth century, few schools could compete with those of Paris for the privilege of counting Gratian among their graduates.[77]

[70] Cf. FREDBORG (ed.), *The Latin*, p. 6.

[71] Cf. ibid., pp. 12-13.

[72] Another example of the relationship between rhetoric and canon law is described in J. O. WARD and K. M. FREDBORG, "Rethoric in the Time of William of Champeaux," in ROSIER-CATACH (ed.), *Arts*, pp. 219-233.

[73] CICERO, *De inventione*, 1.5.6.

[74] SCHULTE (ed.), *Die Summa*, p. 3.

[75] Neither did Gratian follow Cicero's explanation on the sources of law. Cf. *De inventione*, 2.22-38.65-68.

[76] S. KUTTNER, "The Revival of Jurisprudence," in R. L. BENSON and G. CONSTABLE (eds.), *Renaissance and Renewal in the Twelfth Century*, Cambridge, Harvard University Press, 1982, p. 310.

[77] Cf. G. MAZZANTI, "Graziano e Rolando Bandinelli," in *Studi di Storia del Diritto*, 2 (1999), pp. 79-103; and J. M. VIEJO-XIMÉNEZ, "La composición de C.28 del Decreto de Graciano," in B. D'ALTEROCHE, F. DEMOULIN-AUZARY, O. DESCAMPS, and F. ROUMY (eds.), *Mélanges en l'honneur d'Anne Lefebvre-Teillard*, Paris, Éditions Panthéon-Assas, 2010, pp. 1007-1029.

In the origins of the modern science of law,[78] the novelty was the rational approach to a discipline inherited from the first millennium and improved by the Gregorian reform. The father of the science of canon law developed a singular methodology based on rhetoric (*causae*, *questiones*, *exempla*), on dialectic (different types of *distinctiones*), on the hierarchy of norms (D.5-D.12: *ius nature [naturale]*, *ius constitutionis*, *consuetudo*), on the rules for the dispensation of mercy (D.13-D.14 and C.1 q.7 d.p.c.5-c.23), on the legal force of the *ecclesiasticas constitutiones* (D.3 d.p.c.2: *decreta pontificia*, *statuta conciliorum*; D.15-D.20: *generalia concilia*, *episcoporum concilia*, *decretales epistolae*, *sanctorum Patrum dicta*), and on the rules for interpreting these authorities in a systematic way (D.29 pr.: *ex causa*, *ex loco*, *ex tempore*). Canon law was not a corpse. Gratian and the first decretists were not the poor relations of the civil lawyers. The western legal culture also has canonical roots.[79]

[78] Cf. P. LANDAU, "Bologna. Die Anfänge der europäischen Rechtswissenschaft," in A. DEMANDT (ed.), *Stätten des Geistes-Große Universitäten Europas von der Antike bis zur Gegenwart*, Köln-Weimar – Wien, Böhlau, 1999, pp. 59-74.

[79] Cf. C. LARRAINZAR, "Las raíces canónicas de la cultura jurídica occidental," in *IC*, 41 (2001), pp. 13-35 (= "Le radici canoniche della cultura giuridica occidentale ", in *IE*, 13 [2001] pp. 23-46).

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JURISPRUDENCE — I

GRAVE DEFECT OF DISCRETION OF JUDGEMENT (CAN. 1095, 2^{O}) INCAPACITY TO ASSUME THE ESSENTIAL OBLIGATIONS OF MARRIAGE (CAN. 1095, 3^{O})

(ANOREXIA/BULIMIA NERVOSA)

Sentence *coram* Monier, 21 January 2011, (Italy)[1]

1 — *The facts*

1. Clara Sargento and Bernardo Deluca met in June of 2002 and began an affective relationship. At that time the girl was experiencing some difficulties with her family members and also psychological problems. Canonical marriage was celebrated on 24 April 2004 in the parish church.

Married life did not produce any offspring. Dissensions between the parties emerged right from the beginning, therefore six months after the celebration of the marriage Clara left the marital home.

2. In order to pacify her conscience, Clara presented a *libellus* before the first instance tribunal seeking a declaration of nullity of her marriage with Bernardo.

The joinder of issue was determined on 14 June 2005 under the following formula: "Whether there is proof of nullity of marriage in question due to grave defect of discretion of judgment on the part of the woman petitioner and/or on the part of the man respondent according to the norm of canon 1095, 2º of the Code of Canon Law, and subordinately due to incapacity to assume the essential duties of marriage on the part of the woman

[1] Sentence *c.* Monier, 21 January 2011, (Italy); Prot. No. 20.153. English trans. by Rev. Augsutine Mendonça, JCD. Translated and published with permission of the Dean of the Roman Rota.

petitioner and/or on the part of the man respondent according to the norm of canon 1095, 3º of the Code of Canon Law."

The instruction was carried out through a hearing of the parties and six witnesses, as well as through an expert report.

On 30 March 2007, the judges pronounced a negative sentence on both grounds. Then the woman petitioner appealed to Our Apostolic Tribunal. On 5 November 2007, the doubt to be resolved was determined under the following formula: *"Whether there is proof of nullity of marriage in the case due to grave defect of discretion of judgment in either or both parties; and subordinately due to incapacity to assume the conjugal duties on the part of either or both parties."*

A supplementary instruction of the cause was carried out through a hearing of the petitioner and of one of her witnesses.

After a private expert report was presented, a new expert report was prepared by Prof. Carpelli.

Finally, having completed all legal requirements, after receiving also the written defenses submitted by the advocates of the petitioner as well as by the deputed Defender of the Bond, it is our task now to respond to the legitimately determined doubt.

2 — *The Law*

3. Consent makes the marriage of the parties, and this is a truly human act by which the parties mutually hand over and accept the essential rights and duties of marriage.

The present Code establishes in canon 1095 that the following are incapable of contracting marriage: "2º those who suffer from a grave defect of discretion of judgement concerning the essential matrimonial rights and duties mutually to be handed over and accepted; 3º those who are not able to assume the essential obligations of marriage for causes of a psychic nature."

2 — *In Iure*

3. Matrimonium facit partium consensus, qui est actus vere humanus quo partes sibi mutuo tradunt et acceptant iura et officia matrimonii essentialia.

Vigens codex statuit incapaces esse matrimonii contrahendi in can. 1095, "2º qui laborant gravi defectu discretionis iudicii circa iura et officia matrimonialia essentialia mutuo tradenda et acceptanda. 3º qui ob causas naturae psychicae obligationes matrimonii essentiales assumere non valent."

In contracting marriage the use of reason is not sufficient but adequate discretion of judgement is necessary. In fact, the one marrying must enjoy the capacity to elicit a practico-practical judgement with sufficient estimation proportionate to the conjugal contract, or critical knowledge.

In order for the intellect to be able to elicit a practical judgement, the one marrying must understand and compare the motives which lead to marriage with motives which show some other way.

In a contract of such importance each contractant must also enjoy sufficient freedom which seems to consist in the capacity for deliberating with sufficient estimation and with autonomy of the will from all internal impulses.

4. From the prescript of law, which is rooted in natural law, only grave defect of discretion of judgment, which renders marriage null, is considered. The grave defect considered under the subjective and objective aspects can be explained as follows in the canonical realm: "Thus under the subjective aspect grave defect of discretion of judgment is considered by taking into account the gravity of the psychological condition of the very contractant, into which redound the dysfunctions in the intellectual, volitive and affective or emotional sphere. Then the same defect of discretion is considered under the objective aspect by taking into consideration both of the irrepeatable

In matrimonio contrahendo non sufficit usus rationis sed requiritur congrua iudicii discretio. Nubens enim, ad iudicium practico-practicum ponendum, gaudere debet sufficienti aestimatione proportionata negotio coniugali, vel critica cognitione.

Ut intellectus practicum iudicium emittere valeat, nubens percipere debet necnon aestimare motiva quae ad matrimonium inducunt cum motivis quae aliam viam praebent.

In negotio tanti ponderis alteruter nubens pollere quoque debet sufficienti libertate quae videtur consistere in capacitate deliberandi cum sufficienti aestimatione et voluntatis autonomia a quolibet impulsu interno.

4. Ex legis praescriptione in iure naturali innixa, tantum consideratur gravis defectus discretionis iudicii, qui irritum matrimonium reddit. Gravis defectus de quo agitur sub adspectu subiectivo et obiectivo in provincia canonica observari potest: "Itaque sub adspectu subiectivo gravis defectus discretionis iudicii existimatur ratione habita gravitatis condicionis psychicae ipsius contrahentis, in quam redundant disfunctiones in sphaera intellectiva, volitiva necnon affectionum seu emotionum. Deinde idem discretionis defectus sub adspectu obiectivo aestimatur habita ratione sive irrepetibilis identitatis dignitatisque ipsius personae compartis, sive gravitatis essentialium iurium

identity and dignity of the very person of the partner, and of the gravity of the essential rights and obligations of marriage, consisting essentially of the goods of the spouses, offspring, fidelity and sacrament, with which the activity of the psychic faculties must preserve due proposition" (sent. c. Stankiewicz, 23 February 1990, in *RRT Dec*., 82 [1990], p. 154, n. 5).

5. There are many possible causes which provoke grave defect of discretion. Besides the specifically circumscribed illnesses, there are peculiar sickly conditions or psychological anomalies which can disturb the process of critical thinking and of choosing and have grave influence on the will. For such conditions or anomalies not only diminish but often impede the capacity for free determination and election.

There are indeed persons who make decisions under the pressures of abnormal impulses, without the capacity to resist because of their sickly conditions and, consequently, the necessary and free will is destroyed in the case.

In other words, a sentence in a case from Versailles teaches: "Indeed, the freedom can be constrained without any doubt due to an abnormal constitution or due to morbid conditions of the subject within the psychic faculties themselves, that is to say, in the intellect and in the will: and this results either in a weakened estimative or discretionary faculty, or in subjecting to motives that are certainly not always unconscious,

obligationumque coniugalium, in bonis coniugum, prolis, fidei et sacramenti essentialiter consistentium, cum quibus facultatum psychicarum activitas debitam proportionem servare debet" (sent. *c*. Stankiewicz, diei 23 februarii 1990, in *RRT Dec*., 82 [1990], p. 154, n. 5).

5. Multae sunt possibiles causae quae gravem defectum discretionis provocant. Praeter morbum specifice circumscriptum, non desunt peculiares condiciones morbosae vel anomaliae psychologicae quae perturbare possunt processum vis criticae et electionis et gravem influxum in voluntatem habent. Nam huiusmodi condiciones vel anomaliae non tantum deminuunt sed saepe capacitatem liberae determinationis et electionis impediunt.

Sunt enim subiecti qui ad decisionem ferendam perveniunt sub pressionibus abnormalium impulsionum, absque facultate resistendi attentis eorum morbosis condicionibus et consequenter in casu necessaria et libera voluntas destruitur.

Aliis verbis docet una Versalien.: "Procul sane quolibet dubio libertas ex abnormi constitutione vel ex morbidis condicionibus subiecti coarctari potest in ipsis facultatibus psychicis idest in intellectu et in voluntate: idque sive in imminuta facultate aestimativa seu discretiva, sive in subiacendo motivis vix non semper inconsciis quod maturam electionem impedit, sive in incoercibilibus

that impedes mature choice, or in uncontrollable motions, for example, forcing to one object without the possibility of willing differently.

"However, with similar reasoning we must admit that sometimes, if it is a matter of persons who lack completely either the intellectual faculty or the volitive or affective faculty, a free and imputable choice can be impeded by external circumstances, especially by pressure from others. And this case must be completely distinguished from the infliction of fear. In the latter case the agent really subjects self to something, take for example marriage, in view of avoiding an evil proposed or foreseen from without; but in the former case, the agent who is endowed with a weak power of intellect and will, is easily moved from without toward an object which he or she would otherwise not want. The will is therefore not constricted from without, but has in itself the cause of its fragility, that is to say, the defect of conscious and free choice: other external agents somehow substitute themselves for the will of the subject, and this can happen only because of the sickly condition of the same subject" (sent. c. Pompedda, 19 May 1994, in *RRT Dec.*, 86 [1994], pp. 208-209, n. 3).

6. As to the third form of incapacity established in canon 1095, we are dealing with the incapacity to assume the essential obligations of marriage, that is, with the incapacity to give and assume the object of marriage.

motibus voluntatis veluti ad unum impellentibus abque possibilitate aliter volendi.

"Attamen pari ratione admittere debemus nonnumquam, si agatur de hominibus neque facultate intellectiva neque facultate volitiva neque affectivitate undequaque integris, electionem praepediri posse autonomam atque imputabilem ex circumstantiis externis potissimum ex impulsione aliorum. Quae factispecies omnino distinguenda est ab incussione metus. Heic etenim subiectum agens sese disponit ad aliquid, puta ad matrimonium, intuitu vitandi malum ab externo propositum seu prospectum; illic vero subiectum agens, fragili intellectus ac voluntatis acie praeditum, faciliter ab externo movetur in obiectum quod aliter non vellet. Non coarctatur ideo voluntas ab extrinseco, sed in seipsa habet rationem suae fragilitatis idest defectus electionis consciae ac liberae: aliquomodo alii externi agentes subiecti voluntati sese substituunt, idque tantummodo fieri potest ex morbida conditione eiusdem subiecti" (sent. *c.* Pompedda, diei 19 maii 1994, in *RRT Dec.*, 86 [1994], pp. 208-209, n. 3).

6. Quoad tertiam formam incapacitatis in can. 1095 formulatam, agitur de incapacitate adsumendi obligationes matrimonii essentiales, seu incapacitate dandi et adsumendi obiectum matrimonii.

This incapacity not only extends itself to the three essential goods, the good of fidelity, offspring and sacrament, but also to the capacity to establish the partnership of the whole of life ordered to the good of the spouses. In fact, in the good of the spouses, which is considered as an essential element of marriage, we are dealing with the psychic capacity for establishing interpersonal relationship, at least tolerable, with the partner.

The marriage becomes invalid only because of incapacity, but certainly not because of a difficulty which we often find as a consequence of fragility of the human condition. Similarly, incapacity to assume conjugal duties cannot be invoked because of the breakdown of marriage.

On this matter, the Servant of God Pope John Paul II admonished in his allocution to the Auditors of the Roman Rota: "For the canonist the principle must remain clear that only incapacity and not difficulty in giving consent and in realizing a true community of life and love invalidates a marriage. Moreover, the breakdown of a marriage union is never in itself proof of such incapacity on the part of the contracting parties. They may have neglected or used badly the means, both natural and supernatural, at their disposal; or they may have failed to accept the inevitable limitations and burdens of married life, either because of blocks of an unconscious nature or because of slight pathological disturbances which leave

Haec incapacitas non solum sese extendit ad tria essentialia bona, bonum fidei, prolis et sacramenti, sed etiam ad capacitatem constituendi consortium totius vitae ad bonum coniugum ordinatum. Revera in bono coniugum, considerato uti elemento essentiali matrimonii, agitur de psychica capacitate interpersonalem relationem instaurandi, saltem tolerabilem, cum comparte.

Matrimonium irritum fit tantum incapacitate, at minime mera difficultate quam saepe invenimus ob condicionis humanae fragilitatem. Eodem modo incapacitas adsumendi onera coniugalia invocari nequit ex coniugii naufragio.

In provincia admonebat Servus Dei Pontifex Ioannes Paulus II in allocutione ad Rotae Romanae Auditores: "Deve rimanere chiaro il principio che solo la incapacità e non già la difficoltà a prestare il consenso ed a realizzare una vera comunità di vita e di amore rende nullo il matrimonio; il fallimento dell'unione coniugale, peraltro, non è mai in sé una prova per dimostrare tale incapacità dei contraenti, i quali possono aver trascurato, o usato male, i mezzi sia naturali che soprannaturali a loro disposizione, oppure non aver accettato i limiti inevitabili ed i pesi della vita coniugale sia per blocchi di natura inconscia, sia per lievi patologie che non intaccano la sostanziale libertà

substantially intact human freedom, or finally because of failures of a moral order" (John Paul II, Allocution to the Roman Rota, 5 February 1987, in *AAS*, 79 [1987], p. 1457).

The incapacity to assume the essential obligations of marriage arises from disorders of a psychic nature among which we also find abnormalities of personality.

The incapacity, by which matrimonial consent can be affected, must be present at the time of expressing consent, at least in a latent form.

7. In causes which concern either defect of discretion of judgment or incapacity to assume the essential obligations of marriage, it is necessary to seek the opinion of an expert.

It is the task of the expert to circumscribe and identify the nature, gravity, origin and time of deflagration of the illness or of the disordered condition of the subject.

After a careful examination of the depositions of the parties and witnesses as well as, if there are any, of the reports of medical doctors who had treated the subject before and after the marriage, the expert must explain to the judge, in his reasons, the facts and circumstances from which he or she reached his or her conclusions. The conclusions, which present themselves as mere opinions without logical link with the facts contained in the procedural files, seem useless.

When several expert reports are prepared and if the experts disagree

umana, sia, infine, per deficienze di ordine morale" (Ioannes Paulus II, Allocutio ad Rotae Romanae Auditores, diei 5 februarii 1987, in *AAS*, 79 [1987], p. 1457).

Incapacitas adsumendi obligationes matrimonii essentiales oritur ex deordinationibus naturae psychicae inter quas etiam abnormitates personalitatis invenimus.

Incapacitas, qua matrimonialis consensus affici potest, praesens esse debet tempore prolationis consensus, saltem modo latenti.

7. In causis quae sive defectum discretionis iudicii sive incapacitatem adsumendi obligationes essentiales respiciunt, necessarie requiritur periti votum exquirere.

Ad peritum pertinet circumferre et praebere morbi, vel morbosae condicionis subiecti, naturam, gravitatem, originem et tempus deflagrationis.

Post attentam ponderationem partium testiumque depositionum necnon, si adsint, relationum medicorum qui curas subiecto praestiterunt tempore prae et postnuptiali, peritus iudici, in suis rationibus, ostendere debet facta et circumstantias ex quibus ille ad suas conclusiones devenit. Inutiles videntur conclusiones quae se praebent tantum uti merae opiniones absque logica connexione cum factis quae in tabulis processualibus continentur.

Cum plures relationes peritales confectae sunt et si Periti inter se

with each other, according to established jurisprudence, "one is not to conclude immediately that the matter is not proved, but accept the opinion of those who seem better informed ...

"They are to be considered better informed, who used the method which is more scientific and more in accord with the precepts of law concerning this matter" (sent. c. Lefebvre, 17 October 1959, in *RRT Dec.*, 51 [1959], p. 450, n. 4).

The judge is not to passively accept the conclusions of the expert. In fact, the judge must weigh the correctness of reasoning of the conclusions of the expert together with the truthfulness of the facts on which the same conclusions depend. According to the norm of law, the judge is to weigh carefully not only the conclusions of the experts, even if they are in agreement, but also the other circumstances of the case (cfr. can. 1579, §1).

dissentiant, iuxta receptam Iurisprudentiam, "non illico concludendum est rem non probari, sed iis assentiendum est, qui melius videntur informati…

"Melius instructi censendi sunt, qui illa explorationis methodo usi sunt, quae magis scientifica est et magis congrua iuris praeceptis hac de re" (sent. *c.* Lefebvre, diei 17 octobris 1959, in *RRT Dec.*, 51 [1959], p. 450, n. 4).

Iudex periti conclusiones non tantum passive accipere debet. Iudex enim videat rectitudinem ratiocinationis conclusionum periti una cum factorum veridicitate e quibus eaedem conclusiones pendent. Ad normam legis Iudex non peritorum tantum conclusiones etiamsi concordes, sed cetera quoque causae adiuncta attente perpendere tenetur (cf. can. 1579, §1).

3 — The Argument

8. After a supplementary investigation as well as acquisition of expert reports, first of all the woman's character and the evolution of her personality must be explained within the context of the peculiar family.

Already in the first grade of jurisdiction, the woman petitioner had spoken about her family background, by describing her parents as "rigid, old style," and offers the following reasons: "Specifically, with the passage of years I found out that it was difficult to establish real trust in them because I knew that they perhaps did not comprehend or understand my way of thinking, some of my attitudes were too modern for them" (Summ. 20/3). Finally in this grade of trial the woman contends: "There never was a true dialogue with my parents, a true trust. My grandmother's affection compensated this in part" (Summ. 208/3).

The woman offers examples of her inept relationship with her parents or of their upbringing: "When my parents had to talk to me, this took place in a formal way; they literally called me into the living room, made me sit on a special seat and started to give me their message. I add that on the part of my parents there were no gestures of affection in my presence ... it was absolutely forbidden that I, even during my final years at the secondary school, could have a boyfriend; my parents were scared of me eventually having a male friend, even from the point of view of an image I could give to the people of the place where we lived and where everyone knew each other" (Summ. p. 209).

The petitioner also recalls the behaviour of her parents when her mother discovered the "diary" wherein the girl wrote about her affectionate relationship with some young man. The reaction of the parents towards the daughter was severe: "They read it for the first time. When I returned home ... my mother was so to say very upset, she dragged me by the hair, she accused me of being a disgrace to the family, she told me that I must get out of the house. I was isolated in the house for two months ... because they were afraid of the opinion of the village, which however was unaware of all this ... Already from the secondary school I suffered from eating problems ... When the above mentioned episode occurred, I reacted by eating very little for two months" (Summ. p. 210).

Because of the above mentioned reasons, particularly because of a sense of guilt, relationships with young men of her age became difficult. The petitioner testifies as follows about this matter: "I was so isolated. During the following years, which intervened, until my first encounter with Bernardo Deluca, I had three sentimental relationships, marked by a notable difficulty, before being able to live peacefully. I always had before me that harsh and angry face of my mother, as she always stood looking out for me ... These sentimental stories then ended ... I just forgot them all. These stories lasted only for a short time at the beginning and, when it was time to begin to construct and plan something solid and stable, I pulled myself back, because I did not know where to begin" (Summ. p. 210). Nobody dare deny the unusual or pathological behaviour of the petitioner in establishing relationships with others.

9. In her first testimony, the petitioner's mother describes the family as a peaceful environment, but in this grade she fully confirms her peculiar behaviour bereft of any display of affection toward the daughter: "I am certainly very rigid, this is part of my character and even I was brought up in this way ... Also my husband describes me rigid in my views, but I am not aware of it, it is automatic" (Summ. Alt. p. 5).

The petitioner's mother certainly did not understand her daughter's need for affection and she candidly admits this: "I am responsible for not taking note of certain particular matters, I am a practical person. Clara certainly did not receive hugs during her infancy and youth. I raised her as independent as possible" (Summ. Alt. p. 7). The witness also amply confirms her abnormal reaction after reading the diary of her daughter: "At that moment the world collapsed around me. It was contrary to my principles and my teachings. It was proof of my failure. I remember jumping at her and I did not strangle her because my husband pulled her away from my hands. She did not respect herself and she deserved to be strangled. First of all, she took some beating and I did not care how she would take it" (Summ; Alt. p. 7).

10. As is evident from the procedural files, when the woman knew the respondent, as well as during the engagement period, the problems mentioned above were certainly not resolved. Within only one month from their first meeting the respondent proposed marriage. In her first testimony the woman testifies: "I misrepresented my feelings for Bernardo" (Summ. 21/5). The petitioner's parents accepted the decision to marry and insisted "because this situation had to be resolved and they quickly agreed to the marriage" (ibid.). In another testimony the woman adds: "My parents did not ask me many questions and did not even try to probe into my feelings, my real wish, if I had considered carefully such a decision in view of the short period of engagement, but they immediately indicated that they were favorable insofar as they saw in this proposal, in my acceptance, something socially acceptable" (Summ. p. 211).

In view of the pressures from her parents, the woman petitioner at that time anticipated the time of the wedding. The deputed Defender of the Bond notes as follows concerning the woman's choice: "The reasons underlying the feeling and acting displayed by the woman ... seem sufficiently mature also in what pertains to her decision to anticipate the wedding remaining free" (Animad. 11/26). Nevertheless, as is evident from the procedural files, such an estimation of the defender of the bond really does not correspond to the truth of the facts.

During the first grade of the trial, the petitioner spoke of the behaviour of her parents with regard to her decision to marry and testified that she was not able to express her own will: "In view of the attitude of my parents which caused in my relationships a real and typical war, I was not able to express my will, my choices ... But at that time it seemed to me rather easy to anticipate the wedding" (Summ. 24/7).

In her second testimony the woman petitioner clarifies the change in the behaviour of her parents, who were first strongly in favour of this wedding, then they strenuously opposed it. The petitioner makes the following

observation about this matter: "They began what I call their 'counter battle', saying that they did not like Bernardo, that he lived far away and that I would have to ply between places and similar things and that therefore I should not be marrying him without specifying anything serious, still less anything grave to impute to my fiance" (Summ. p. 211). Therefore, the petitioner ended up in a grave state of confusion: "I felt at this point like a flag in the wind, first because I did not have the courage to delay the wedding in order to get to know Bernardo better, now because, after consenting to the anticipation of the time, I was told that I should no longer marry, without providing any reason" (Summ. p. 211).

Without doubt the volitive process, or the practico-practical judgement, is considered sufficiently disturbed, according to the advocates of the petitioner, "the decision does not seem to have been sufficiently supported by apt reasons: the desire for the so-called 'flight' was prevalent" (Restrictus, p. 13), as it is deduced from the testimony of the petitioner: "I sensed in such a difficult situation that at least the marriage would give me the possibility of getting out of this vicious cycle. The idea of living with Bernardo was not that comforting to me, but the idea of breaking once and for all this mechanism, which I felt like a manipulation" (Summ. p. 211). These are the reasons in the petitioner's mind for marrying!

11. The engagement period was without doubt brief and during that time the petitioner was focused only on the thoughts of completing her studies. In fact, there was no lack of disagreements with the respondent because of differences in their behaviour and character. The petitioner spoke of this matter: "I must say that I found myself in Bernardo's world which is totally different from mine" (Summ. p. 212). The wedding day clearly explains the internal mental state of the petitioner and her state of utter confusion. In fact, in the first grade the woman states that before the celebration "for the first time I became aware of the mistake I was making," then she recalls it: "During the ceremony, however, I continued to ask myself how could I turn back ... I realized that I was marrying against my real will" (Summ. 23/9).

Again the petitioner offers at length reasons concerning her indecision and her internal disturbance. The woman spoke about "the terrible state of anxiety, so much so that I was trying to signal to my friends the state of my mind in order to stop the procession" (Summ. p. 213). But everything was prepared for the celebration of the wedding and she herself could not disclose this to the priest that "I did not feel like marrying" (ibid.). The petitioner also adds: "throughout the ceremony I cried my eyes out, without being able to stop the tears, I felt so much like being in a cage and impotent to stop the 'machine'" (ibid.).

On his part the man respondent confirms the difficulties in relationships on the part of the woman with her parents, but he did not notice anything unusual and testifies that the woman had repeatedly begged for the wedding for following reasons: "because she wanted to anticipate our wedding for no longer being able to live with her parents" (Summ. 35/7). The respondent testifies that on the day of the wedding they were "serene and happy" (Summ. 36/9). It was only after the wedding that the respondent was informed of the woman's trouble in the area of her work: "Clara ... appeared not to have very clear ideas" (Summ. 37/10), and six months from the celebration of the marriage the woman exploded: "She passes the evening by telling me how much she was fed up with her parents, of my parents, of the house we were living in, of work." After this event the woman returned to her father's house and the respondent never visited her. Even on the day of his deposition, the man respondent questions himself again about the absurd behaviour of the woman: "I am not able to explain her behaviour at the time of our separation" (Summ. 32/2).

12. Among the witnesses of the petitioner, her father does not deny the dominance of his wife over his daughter. The witness adds also that his daughter was very focused on her work while "on the level of her life she is very emotional and is easily influenced" (Summ. 58/9). The same witness thinks that at that time his daughter was not mature enough to contract marriage because of the following reasons: "also because she physically did not have the time to dedicate herself to establishing a family, since she was always preoccupied with her activities related to study and research" Summ. 58/8).

The petitioner's mother, whose control over her daughter's life had great influence, as we have seen at length, admits in the first grade: "It was I who suggested to Clara the need to marry" (Summ. 53/5). Witness Pierre Antonio, who had assiduously dated the petitioner for three years, recalls the decision of the parties to marry and notes: "Clara spoke to me about it with enthusiasm and certainty" (Summ. p. 48); however he confirms the subsequent confusion and lack of certainty within a very short time. The witness states as follows about this matter: "As the wedding date approached, Clara seemed to me very uncertain about the step she was preparing to take ... a few days before marriage ... Clara told me that she had some doubts ... she was no longer certain of what she was doing" (Summ. p. 48). The testimony of the witness certainly seems to be of utmost value and fully corroborates the petitioner's disposition.

Rev. Sargento, a cousin of the petitioner, officiated at the celebration of the marriage. The witness thinks that the decision to marry was not "made on the wave of enthusiasm of a great mutual affective transport" and adds: "I also

had the feeling that in this way they wanted formally to put in place matters related to an engagement which was perhaps not carried out according to the wishes of Clara's parents" (Summ. 63/5-8). The witness had doubts with regard to the woman's decision "who still lived as a student with the aspirations of a typical young girl who wants to pursue her studies and who has not yet attained her objectives from this point of view" (Summ. 63/5-8).

Witnesses Roberto and Giacomo, introduced by the respondent, did not notice before the wedding anything strange in the woman's behaviour in her relations with the man. Witness Giacomo however confirms the woman's weeping before the celebration of the marriage (cf. Summ. 72/9-10).

13. In the procedural files there is also the objective fact with respect to the eating disorder from which the petitioner was suffering since her adolescent years and also during her time at the university. The woman states the following concerning this matter: "During secondary school, I began to eat in a disorderly manner, binge eating, without any control; for example, I ate a really excessive quantity of sweets and then stayed without touching any food for two days. Or when I was studying in the afternoon I crunched sweets in large quantity, and then did not have dinner. Then following what I have described, when, after being punished at home, I ate almost nothing. I was punished by my parents, but at the same time, by not eating, I was punishing myself. I recognized the anomaly of this eating behaviour, when I got transferred to Palermo. In fact I ate normally in this city, but when I returned to Pescara I would buy half supermarket to satisfy myself. Gradually these problems began to cease, but I noticed that they were not resolved at the base. Recently however I went to Pisa into a center which treats eating disorders in order to understand the mechanisms which were provoking this disorder and to prevent another onset of the same" (Summ. p. 212).

Because of the above mentioned disorder, the petitioner was treated from January 2007 by Dr. Seccaspina: "A specialist, a psychiatrist, at Resp. Ambulatorio Anoressia, Bulimia." From the symptoms displayed by the woman, the doctor concluded that she suffered from the so-called "Binge Eating Disorder (an uncontrolled eating disorder) [307.50] according to DSM-IV-TR, and which, at the time of special examination, was in the phase of symptomatological compensation but not of clinical solution" (Summ. Alt. pp. 12-13). The doctor thinks that such a disorder was present already from her adolescence for reasons that can be "easily linked to the relational dynamics given the fact that during the time at the university it disappeared through the week and reappeared over the weekend at her parents' home" (ibid. p. 13).

The expert also continues with regard to the evolution and the consequences of the disorder: "As a consequence, persons affected by such a disorder can manage the fear of being not loved through kindness, education and behaviours meant to integrate other persons, because of preoccupation with being inadequate. In time, all this contributes to the development of an 'as if'' personality or a false 'Self'' pleasing and adaptive to the loss of true 'Self'', emptied and devalued" (Summ. Alt. p. 13).

From the interviews conducted during 2007, the doctor found such symptoms in the woman's personality: "- failure to develop a defined identity in its essential aspects, not because of adolescent immaturity but because of fixation on pre-genital ideo-affective models. – coercive reproposition that is harmful to the full exercise of the will, of infantile behavioural patterns, although externally manifesting an attitude apparently mature (for example, at work, in socializing). – consequent existential choices aimed at satisfying neurotic, regressive and conflicting needs or to cover up the same with 'flights into the future' and from the family of origin (as for example, a marriage which expresses a false Self), which Mrs. Sargento was not able to sustain in time" (Summ. Alt. p. 14).

Having explained these things, the conclusions of the doctor seem to be of great importance with respect to the petitioner's decisions to be realized in life: "Although on the cognitive level Clara Sargento might have reached excellent levels and the assessment of reality may have been sufficient, the immature and conflicting ideo-affective components have not only strongly conditioned the quality of life with a diffused suffering, generically somatized over the gastroenteric trait or congealed around a manifestly symptamotological nucleus (relationship substituted with food), but they had determined the more important existential choices so much so that one can interpret them as a direct expression of her own psychopathological nucleus" (Summ. Alt. p. 14).

Without doubt the reasons provided by the doctor must be reflected upon with the greatest attention in view of the doctor's examination and the time of treatment.

14. We find three expert reports in the procedural files, and two of these were prepared *ex officio*.

The first expert report was prepared by Dr. Berlingo (a doctor specialized in neuropsychiatry). At the same time the so-called "Rorschach Test" was administered by psychologist Dr. Rosario. The expert reached the following diagnosis with solid arguments: "Immature development of personality." The same expert thinks that the psychological conditions of the woman were grave

(Summ. p. 104) and they had direct effect on her internal freedom: "At the time of marriage, the young girl consumed by the prevalent preoccupations of studies and work, pressured by her parents who were making her feel guilty, stimulated by a fiance who thought prevalently about his own future plans, expressed her consent under the prevalence of emotional disturbances rather than in full internal freedom and awareness" (Summ. p. 102).

We read in the conclusions of the report: "3) The situation in which the girl found herself at the time of the wedding with a clear predominance of emotional pressures over the critical faculty and judgement, impeded her from being able to understand the responsibilities, the duties and the tasks which she was going to assume. 4) because of the same psychological conditions of immaturity, the girl was not in a position to assume the responsibilities related to marriage, particularly the creation of a matrimonial partnership and to be able to orient herself to the good of the spouses" (Summ. p. 105). Also the gravity of the psychological condition is deduced from the "Rorschach Test" which revealed in the woman "psychic restlessness, which expresses itself with changes in emotion, impulsivity and immaturity" (Summ. p. 112).

15. The second expert report was prepared by psychologist Rocca. The expert administered to the woman the so-called "TAT, MMPI. 2, SCID. II tests." In this extra-judicial report the expert found in the petitioner's personality the so-called "dependent personality disorder" (Summ. p. 175). The same expert describes this kind of disorder as follows: "Such a disorder of personality is characterized by a pattern of social inhibition, feelings of inadequacy and hypersensibility to a negative opinion" (Summ. p. 175). The expert thinks that the disorder was present in adolescence, although it had not affected the intellectual capacity but on the contrary "it had damaged ... her will and her emotions impeding her from freely choosing the marriage and to assume the duties inherent to matrimonial obligations" (Summ. p. 176).

The expert puts forth the following reasons in the area of relationship with others: "The subject is seriously impeded by an incapacity to internally maintain an adult relationship. The emotional infantilism of Clara Sargento, brought to light by the test, is evidenced by the same descriptions of the subject who describes all pre-nuptial relationships as founded on external aspects. The failure to acquire fundamental trust, the bond of ambivalent attachment with significant figures, had led the subject to cultivate an attitude of closure which expresses the real difficulty in relating to new situations by formulating an opinion on them and by evaluating them" (Summ. p. 176).

For this reason, because of such a disorder, according to the expert's conclusions, the woman was incapable of formulating an authentic choice of establishing an appropriate and healthy interpersonal relationship. Among the reasons indicated by the "test," the conclusions emerging from the so-called "TAT," seem very important: "from the protocol emerges oedipal conflict besides the failure in the process of separation-individuation. From those crucial conflicts arise: dependence and infantile affectivity, latent aggressivity, hostility and rivalry toward the mother, persecutory and depressive anxiety, relational anxiety, insecurity, disturbance in the image of own body and of own Self, no clear sexual identification. Certainly the affective-sexual and relational areas paired together are more disturbed, with a strong depressive tonality. Moreover, there are present both lability and obsessivity, further signs of an internal conflict" (Summ. p. 171).

16. In this grade of the trial a new expert report by Prof. Carpelli was prepared by order of the *Ponens*. The expert only examined the woman and carefully evaluated the procedural files.

As to the preceding expert reports, our expert makes some distinctions. For, with regard to the conclusions of Dr. Berlingo, Prof. Carpelli agrees in fact that we are dealing with "a problem of immaturity determined principally by persistent pressures from the parents on scholastic-academic aspect to the detriment of conscious and balanced development of emotional experiences and of their integration intrinsic to an autonomous project of life. Consequently, the emotional load related to marriage as an opportunity to free herself from her parents had a negative impact on the evaluation of the essential meaning of the step she was going to take: the conjugal union with the respondent therefore took second place with respect to the need for separation-differentiation in her relationship with her family of origin" (Summ. Tertium, p. 20). However, the expert does not agree with the qualification of the gravity while there are no objective elements which could have confirmed the note of gravity.

The expert disagrees with the diagnosis made by Dr. Rocca, but fully agrees with regard to the abnormal relationship between the woman and her parents: "Dr. Rocca emphasizes how the relationship between the parents and the daughter was extremely ambivalent: on the one hand she interpreted the continuous attention of her parents as a sign of 'lovableness', on the other hand however their critical and evaluative attitude was a sign of lack of lovableness, or in any case a sign of conditional love. Several indicators have been picked up quite well by the expert of the party. Moreover, it agrees with the opinion that the petitioner is an affectively fragile and insecure person" (ibid.).

As to the report of Dr. Seccaspina, who treated the woman during 2007, the expert disagrees with the diagnosis "disorder of uncontrolled dieting" but admits the above mentioned report as "fully acceptable in part in which there is evidence of problems of 'false Self'" (Summ. Tertium, p. 21).

However, one is not to forget that Dr. Seccaspina examined the woman several times and correctly presented the elements of her life history. On the other hand, Dr. Seccaspina specifically works with and assists persons who suffer from the so-called "dieting disorder." For this reason we think that the reasons presented by Dr. Seccaspina must be considered very important, as the advocates of the petitioner agree in their conclusions (cf. Restrictus, p. 25).

17. However, Our expert without doubt explains very clearly the problems which pertain to the sphere of internal freedom as well as to the confusion in the mind of the petitioner at the time the consent was expressed.

The expert presents the reasons concerning the influence of the relationships between the petitioner and her parents: "The petitioner lived out the rules in the family as a torture ... Under the psychological aspect, the family environment can be regarded as unhealthy" (Summ. Tertium, p. 34). The analysis of the woman's personality at the time of the wedding is very important because of the discord between the cognitive-intellectual part and affective part: "The affective world of Mrs. Sargento was still rather uncertain at the time of marrying. The situation she was subjected to by her parents during the proposal and the presentation of her fiance coincided with her first rebellion to the oppressive rules of the mother. The feelings became even more confused and impulsivity took over" (Summ. Tertium, p. 36).

The expert amply confirms the state of confusion in the woman's decision to marry: "The woman was confused. She realized that something was wrong, but she did not have a real understanding of it, she did not know why or what was troubling her. The manner in which she had to decide to marry the respondent was however a great suffering for her; it was quite normal that there were doubts and even worries" (Summ. Tertium, p. 38).

As to the freedom of choice, the expert thinks that the woman's choice was disturbed due both to affective immaturity in the subject and to family environment. In fact we read: "The freedom, as said also in the expert report, was compromised by the combination of affective immaturity, family environment and circumstantial situation. As stated also in the expert report: at the moment of marrying, the critical faculty of Clara Sargento was affected not only by immaturity, by itself not that grave, but also by the situation of manipulation to which the woman was subjected by her family ...

There was considerable violation from an external view point which created a modification of a totally new behaviour in the woman, especially when there was moreover a need to serenely evaluate her companion ... The woman was deprived particularly of this: a just and free situation wherein to ponder over the variables which she was facing and to make a decision. She needed to ponder over her situation of rebellion towards the family which 'was sizzling under the ashes' for a long time, and the choice of marriage was part of it" (Summ. Tertium, p. 37). In the same review of the expert report, for reasons which he explains with the greatest care, the expert came to the following conclusion: "In such a situation the woman was completely deprived of the freedom to evaluate" (ibid.).

In his reasons, the deputed Defender of the Bond concludes: "The attempts of the petitioner in the cause to force the expert to certify a greater gravity of the case turned out to be substantially futile (Summ. Ter. pp. 34-38), because according to the correct Catholic anthropology and Doctrine, the woman petitioner's choice of motivations, including external elements, without having proven some grave structural anomaly, fortuitously placed conditions which did not affect her human decision. However, we are of the opinion that one must note that really questions beyond the investigation of some grave anomaly are not to be admitted in the review session so that the evaluation no longer turns out to be an 'expert' but a 'judicial' report" (Animad. 25/52).

However, we think that, although the expert spoke of immaturity in a moderate level, there stand out in the woman at the time of pronouncing consent peculiar psychological conditions adequately explained by the expert reports, proven sufficiently in the procedural files, which not only diminished but gravely impeded the process of election, because of defect of internal freedom. As is clear, the experts agree on the defect of freedom in the woman petitioner in choosing marriage as well as on its gravity. For this reason, the Undersigned Prelates Auditors think that grave defect of discretion of judgment in the woman petitioner has been sufficiently proven and consequently her incapacity to assume the essential obligations of marriage. In fact, the grave psycho-affective fragility of the woman together with the so called "traits of dependent personality" and "problems in identification of self" strongly concur with the woman's incapacity to assume conjugal duties, particularly in establishing interpersonal relationships. On the other hand, the brevity of married life and the petitioner's abnormal behaviour with her husband during the separation are of great importance for clarifying the irresponsible choice of marriage without sufficient or proportionate internal freedom as well as her incapacity to establish proper conjugal relationship.

18. As to the man respondent, the procedural files reveal nothing beyond the norm. As the deputed Defender of the Bond rightly observes, the man's powers of feeling and acting do not demonstrate psychic anomalies neither in the evolution of his personality nor during the engagement (cf. Animad. 26/55). The expert of the first grade spoke only of "the character traits which do not affect the expression of matrimonial consent" (Summ. p. 103). Similarly the expert of Our Tribunal excludes the presence of an anomaly of a psychic nature in the man's personality at the time of the wedding and the same expert thinks that the man was mature when the choice of marriage was made (Summ. Ter. p. 18).

Therefore, the grounds of nullity on the part of the man certainly have no foundation in the procedural files.

19. Having properly explained and carefully weighed everything said in law and in fact, We the undersigned Prelates Auditors of the *Turnus*, sitting for the Tribunal and having only God before Our eyes, having invoked the name of Christ, decide, declare and definitively pronounce to the proposed doubt:

> **AFFIRMATIVELY**, THAT IS, THERE IS PROOF OF NULLITY OF MARRIAGE IN THE CASE ON THE GROUND OF GRAVE DEFECT OF DISCRETION OF JUDGMENT AND INCAPACITY TO ASSUME THE ESSENTIAL OBLIGATIONS OF MARRIAGE ON THE PART OF THE WOMAN PETITIONER. THE SAME WOMAN IS PROHIBITED FROM CONTRACTING ANOTHER CANONICAL MARRIAGE WITHOUT CONSULTING THE TRIBUNAL OF THE FIRST GRADE.

We pronounce thus and commit to local Ordinaries and Administrators of Tribunals to whom it pertains, that they notify this Our definitive sentence to all who have the right, and execute it with respect to all its legal effects.

Given in Rome, at the seat of the Tribunal of the Roman Rota, on 21 January 2011.

Mauritius MONIER, *Ponens*
Pius Vitus PINTO
Ioannes G. ALWAN

Because this sentence, which has declared the nullity of marriage for the first time, must be forwarded to the appeal *Turnus* (can. 1682, §1), it cannot be executed, that is, the parties have no right to contract a new marriage (can. 1684, §1).

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JURISPRUDENCE — II

IRREMEDIABLE NULLITY OF THE DECREE VIOLATION OF THE RIGHT OF DEFENCE (1620, 7°; *DC* ART. 270, 7°)

Decree *coram* Pinto, 22 June 2001, Green Bay, Wisconsin (USA)[1]

The undersigned Fathers Auditors of the *Turnus*, legitimately convened on 22 June 2001 at the seat of this Apostolic Tribunal to define, in the above mentioned case, the incidental question: *"Whether there is proof of nullity of the decree of confirmation issued by the Appeal Tribunal of Milwaukee on 16 May 2000,"* issued the following decree.

1 — *The Facts*

1. The parties in the cause, that is, the petitioner, born in 1940, and the respondent, born in 1939, after their first meeting in June of 1964 developed a love relationship. They married in the Church on 26 June 1965 at the end of the engagement period which passed without constant meeting because the man was traveling constantly due to his work.

The marriage was blessed with four children, of whom two were twins, but it turned unhappy due to an increase in disagreements over betrayal of conjugal fidelity on the part of the man, according to the woman, or because of disagreement with regard to the education of children, as the man contends.

2. On 15 June 1999, the petitioner presented the *libellus* before the Tribunal of Green Bay, seeking a declaration of nullity of her marriage indicating an uncertain formula: "My husband's lack of intent to maintain a truly

[1] Decree *c*. Pinto, 22 June 2001, (Green Bay, WI, USA), in *RRT Decr*., 19 (2001), pp. 100-104. English trans. by Rev. Augustine Mendonça, JCD. Translated and published with permission of the Dean of the Roman Rota.

sacred and exclusive union with me." On 6 August 1999, the President determined the canonical formula of doubt: "Whether the marriage in question is invalid because of: an intention against fidelity on the part of the Respondent (cf. 1101, §2) and/or an intention against the good of the spouses on the part of the Respondent (cf. 1101, §2)."

After hearing the parties and two witnesses and having received a letter from the respondent sent to the tribunal, after the publication of the acts, in which the respondent exposed his contrary opinion concerning the proposed doubts, a sentence of a single judge was pronounced on 11 February 2000, determining: "The nullity of the marriage in question has been proven because of an intention against fidelity and an intention against the good of the spouses on the part of the Respondent (cf. 1101, §2)."

The same day the respondent was notified of the sentence, and he interposed an appeal on 20 February 2000 and finally on 14 March 2000 expressed to the same judge his intention to appeal to Our Apostolic Tribunal.

On 21 March 2000 the judicial vicar of the tribunal of Green Bay determined a time period of thirty useful days to provide his reasons for prosecuting the appeal. The respondent however confirmed on 12 April 2000 his decision to appeal to the Roman Rota including the sum of $850.00 for the expenses of Our Tribunal.

On 25 April 2000, relying on his ignorance of the prescript of canons 1633-1634 (cf. can. 1883 *CIC* 1917; art. 215 Instr. *Provida Mater*), the judicial vicar, after the useful time had passed in vain for presenting the reasons for prosecuting the appeal, transmitted the acts to the tribunal of appeal according to canon 1682.

The Metropolitan Tribunal of Milwaukee, after constituting a College of judges on 16 May 2000, decreed that "the Respondent in this case was thus unable, or unwilling to indicate, even in summary fashion, reasons for the appeal as required by can. 1634," and then having received the observations of the defender of the bond, confirmed on the same day the sentence of the first grade in following words: "Therefore by this decree of the undersigned Judges the affirmative decision of the Court of First Instance is confirmed."

However, on 8 May 2000 the respondent proposed a recourse before the Supreme Tribunal of the Apostolic Signatura, which, after receiving information from the lower tribunals and declaring the suspension of the execution of the appealed decision, decreed on 12 June that the cause must be judged at the Roman Rota, where, after the *Turnus* was constituted, the *Ponens* ordered on 13 December that the question must be resolved through written briefs.

After repeatedly hearing the Promoter of Justice and the Defender of the Bond of Our Tribunal and having exchanged the written briefs of the advocates *ex officio*, it is our task today to define the proposed incidental question.

2 — *The Law*

3. The right of appeal and its legitimate prosecution is sanctioned in almost the same words in the new and old law (cf. cann. 1630-1635 *CIC* 1983 e 1311-1315 *CCEO*; 1681-1683 *CIC* 1917 and art. 215 Instr. *Provida Mater*).

The present law of the Code presents a novelty in the sense that the reasons for appeal are to be presented before the judge *ad quem*. However, some experts in procedural law inconsistently insinuated that in prosecuting an appeal we are dealing with a true *libellus* similar to the one introducing the controversy (cf. M. J. Arroba Conde, *Diritto processuale canonico*, Roma, 1996, p. 553). The mind of the legislator was to render simpler the procedure in general and the law on the *libellus* which presents an appeal in particular. Moreover, this is consistent with the teaching of the authors (cf. F. Roberti, *De processibus*, vol. II, Romae, 1926, p. 214, n. 479; F.X. Wernz – P. Vidal – F.M. Cappello, *Ius canonicum,* vol. VI, *De processibus*, Romae, 1949, p. 585, n. 613; C. de Diego-Lora, Ad cann. 1598-1655, in *Código de derecho canónico*, curantibus P. Lombardía y J.I. Arrieta, Pamplona, EUNSA, 1983,

2 — *In Iure*

3. Ius appellationis et istius legitimae prosecutionis fere eisdem verbis sancitur in lege nova et vetere (cf. cann. 1630-1635 CIC 1983 e 1311-1315 CCEO; 1681-1683 CIC 1917 et art. 215 Instr. *Provida Mater*).

Novam tamen se praebet lex vigentis Codicis in eo quod rationes appellandi sunt praesentandae coram iudice ad quem. Incongrue tamen non nulli processualistae insinuaverunt agi in prosequenda appellatione de vero libello ad instar illius litis introductorii (cf. M.J. Arroba Conde, *Diritto processuale canonico*, Roma, 1996, p. 553). Mens legislatoris fuit simpliciorem reddere proceduram in qenere et in specie de libello appellationem proponente. Ceterum hoc Auctorum doctrinae cohaeret (cf. F. Roberti, *De processibus*, vol. II, Romae, 1926, p. 214, n. 479; F.X. Wernz – P. Vidal – F.M. Cappello, *Ius canonicum*, vol. VI, *De processibus*, Romae, 1949, p. 585, n. 613; C. de Diego-Lora, Ad cann. 1598-1655, in *Código de derecho canónico*, curantibus P. Lombardía y J. I. Arrieta, Pamplona, EUNSA, 1983, p. 973; M. Cabreros de Anta, Ad cann. 1667-1705, in *Comentarios al Código*

p. 973; M. Cabreros de Anta, Ad cann. 1667-1705, in *Comentarios al Código de derecho canónico*, vol. III, Madrid, BAC, 1964, pp. 418-419).

Our opinion also is in agreement with that of the above mentioned authors: "The *form* of prosecution [that is to say, in the new Code] has been reduced to the essential: *invocation of ministry* signifies the instance of a party or rather generally of the procurator or advocate, which asks the judge to reform the sentence. Secondly, it asks to attach a copy of the same sentence; thirdly, to indicate the motives for the appeal" (P.V. Pinto, *I Processi nel Codice di diritto canonico. Commento sistematico al Lib. VII*, Città del Vaticano, LEV, 1993, p. 423).

This opinion obtains greater strength if we consider that the juridic institute of appeal has its foundation in the alleged injustice of the decision that has been pronounced, hence the right of a Christian faithful, which is bound to the extinctive time periods, and the consequent necessity of a second hearing of a higher judge. Furthermore, according to the expression "Curia knows the laws," and the theological principle of diakonia of an ecclesiastical judge, a simple manifestation of essential motives is sufficient, which summarily indicate the reasons underlying the alleged injustice.

The latest argument which confirms those points we have explained

de derecho canónico, vol. III, Madrid, BAC, 1964, pp. 418-419).

Praefatis Auctoribus et Nostra adhaeret opinio: "La forma della prosecuzione [idest in novo Codice] è ridotta all'essenziale: *ministerium invocare* indica l'istanza della parte o più generalmente del procuratore o avvocato, che chiede al giudice di riformare la sentenza. In secondo luogo si chiede di allegare copia della medesima sentenza; in terzo luogo di indicare i motivi di appello" (P.V. Pinto, *I Processi nel Codice di diritto canonico. Commento sistematico al Lib. VII*, Città del Vaticano, LEV, 1993, p. 423).

Haec opinio maiorem obtinet vigorem si consideramus quod iuridicum institutum appellationis fundamentum habet in praesumpta iniustitia prolatae decisionis, inde ius christifidelis, quod fatalibus adstringitur terminis, et consequens necessitas secundae superioris iudicialis audientiae. Insuper, iuxta effatum "Curia novit iura," et theologicum principium diaconiae ecclesiastici iudicii, sufficit essentialium motivorum simplex manifestatio, indicantium summatim praesumptae iniustitiae rationes.

Novissimum argumentum ea quae supra exposuimus confirmans venit

above comes from Article 105 of NRRT which prescribes: "The *libellus* of the appeal must indicate reasons for the grievance, except in cases of the status of persons." It uses the verb 'to indicate', which, if words are not empty sounds, signifies only nods or indications; secondly, that in causes concerning the status of persons, that is, matrimonial causes, the reasons of grievance are not required, provides at least indirect confirmatory argument to Our opinion.

4. One is not to doubt that omission of or disrespect for procedural laws carry with it an affront to the law not only in procedure but also in decision making through denial of the right of defence; and this pervades the entire procedural iter, which is irremediably violated, because not only the exercise of the right but rather the very right is in fact denied, the first foundation of the process itself.

However, not any denial of the legitimate defence of right is to be considered as the origin and source of irremediable nullity of a sentence, but only when a substantial defect is verified, that is, by denying the possibility of *contradictorium*, that is, all possibility of defending self (cf. sent. *c*. Jullien, 8 February 1936, in *RRT Dec*., 28 [1936], p. 128, n. 20; decr. *c*. Egan, 30 May 1977, Romana, B. 51/77, n. 2, where a list of Rotal decisions is given; decr. *c*. Agustoni, 7 November 1986, in *RRT Decr*. 4

ex art. 105 NRRT praescribente: "Appellationis libellus gravaminis motiva innuere debet, exceptis causis de statu personarum." Verbo utitur innuere, quod, si nomina flatum vocis non sunt, nutus seu indicia tantum significat; secundo, quod in causis de statu personarum, seu matrimonialibus, non requirantur gravaminis motiva, argumentum confirmatorium Nostrae opinioni praebet saltem indirectum.

4. Non est ambigendum legum omissionem vel despectum processualium iuris contumeliam secum ferre non solum in procedendo sed et in decernendo per denegationem iuris defensionis, quod omne pervadit processuale iter, quod tamen insanabiliter violatur, cum non quidem exercitium iuris, sed potius ipsum ius denegatur, primum fundamentum ipsius processus.

Tamen non quaelibet iuris legitimae defensionis denegatio sumenda est uti nullitatis insanabilis sententiae origo et fons, sed tantummodo cum substantialis defectus verificatur, idest negando possibilitatem contradictorii seu omnimodam sese defendendi possibilitatem (cf. sent. c. Jullien, diei 8 februarii 1936, in *RRT Dec*., 28 [1936], p. 128, n. 20; decr. c. Egan, diei 30 maii 1977, Romana, B. 51/77, n. 2, ubi datur elenchus decisionum rotalium; decr. c. Agustoni, diei 7 novembris 1986, in *RR Decr*., 4

[1986], p. 171, n. 4; John Paul II, Allocution to the Roman Rota, 22 January 1996, in *AAS*, 88 [1996], pp. 774-775, n. 3).

It is quite well known that in marriage causes it is necessary to combine two principles, which are after all opposed to each other: substantial defense of the right of the parties through legitimate procedural *contradictorium* on the one hand; and on the other hand, the necessity of avoiding grave harm to the common and private good by keeping secret certain acts from the parties themselves, but never from their procurators. A tribunal certainly fulfills the law in matrimonial procedures if it indicates or notifies only to the advocate, who is also the procurator, those matters which are to be notified to the parties and their advocate. By acting in this way it renders effective according to the letter and mind of the law what is ordered by natural and positive law.

In fact once a procurator has been appointed in a process, a truly procedural link and relationship between the tribunal and the procurator is established, and the procurator takes the place of the party and represents the party in the evolution of the process and is able to safeguard his or her rights. Therefore, the law which determines under penalty of nullity that the possibility is given to the parties and their advocates by the judge to inspect all acts of the process would be fulfilled (cf. can. 1598, §1).

[1986], p. 171, n. 4; Ioannes Paulus II, Allocutio ad Rotam Romanam, diei 22 ianuarii 1996, in *AAS*, 88 [1996], pp. 774-775, n. 3).

Omnino in propatulo est in causis matrimonialibus onus adesse duo componendi principia, tandem aliquando inter se opposita: iuris defensionem substantialem partium per legitimum contradictorium processuale ex una parte; ex altera vero parte, necessitatem damna vitandi gravia bono communi privatoque, per secretationem quorundam actorum ipsis partibus, nunquam vero eisdem procuratoribus. Certe Tribunal in processibus matrimonialibus legem adimplet si tantum advocato, qui sit et procurator, significet vel noticet quae partibus et advocato sunt notificanda. Ita agens ad effectum deducit iuxta litteram mentemque legis, quod a iure naturali et positivo iubetur.

In processu enim legitimo procuratore constituto, nexus et relatio instauratur vere processualis inter tribunal et procuratorem, qui locum tenet partis illamque repraesentat in processus evolutione illiusque iura tuere valet. Ad substantiam idcirco adimpleretur lex statuens sub poena nullitatis partibus et eorum advocatis possibilitatem a iudice donari acta omnia processus invisendi (cf. can. 1598, §1). Ex hoc profluit laudabilis praxis penes Rotam Romanam gratuitum patrocinium adsignandi partibus

From this principle flows the praiseworthy praxis at the Roman Rota of assigning to respondents gratuitous legal aid, who vindicate their truth against the petitioner. This should be done more easily in the Tribunals of North America, which process matrimonial causes with certain growing automatism; and their sentences however are quite often accused of nullity due to violation of the right of defence, the respondent party demanding the right to know all and every single act.

It is indeed the task of a judge to persistently maintain balance between juridic logic, namely granting the right to know the acts and particularly the sentence to those, who might have expressly manifested the will, and prudential judgement, which properly bears upon causes concerning status of persons, not to disclose materially all the acts, because in the absence of an adjudged matter legal remedies are always available, namely plaint of nullity, integral restitution as well as new proposition of the cause, in order to concretely and certainly vindicate the rights of a person.

conventis, quae contra Actorem propriam vindicant veritatem. Facilius hoc fieri deberet penes Tribunalia Americae Septentrionalis, quae crescenti quodam automatismo matrimoniales causas perducunt; quorum vero sententiae saepe saepius accusantur nullitatis ex iure defensionis vulnerato, parte conventa exigente ius omnia et singula cognoscendi acta.

Iudicis enim est aequatione perseveranter uti in processu inter logicam iuridicam, nempe illi ius praebendi acta cognoscendi et praesertim sententiam, qui voluntatem expresse manifestaverit, et iudicium prudentiale in causis de statu personarum proprie innixum, non omnia acta materialiter parti eidem patefacere, cum in absentia rei iudicatae semper praesto sint iuris remedia, nemque querela, restitutio integrum necnon nova propositio causae, ad iura personae concrete certeque vindicanda.

3 — *The Argument*

5. The Fathers noted that there were grave and multiple violations of procedural law in the case: take, for example, the notification of the sentence not made in accord with the norm of law (cf. cann. 1509, 1615), silence of the judge concerning his duty to disclose to the party the modes of appealing foreseen by law (cf. cann. 1614, 1444, §1,1º); erroneous imposition of presenting to the judge *a quo* the reasons for the grievance;

illegitimate manner of proceeding in the second instance, where on the same day, having neglected the prescript on pursuing and safeguarding the man's legitimate intention, the decree of confirmation of the sentence of the tribunal of Green Bay was issued. But, so that the order of the violation of procedural law may appear more clear, we consider below each violation in a chronological order.

6. The sentence issued by the sole judge on 11 February 2000 was notified to the respondent party the same day, but a copy was neither given nor transmitted to the party or his advocate, by observing the norms determined by the particular laws (cf. cann. 1509, 1615). The judge however offered to the respondent or to the advocate only the faculty to approach the tribunal "to review a copy of this decision." The same judge, while he informed the respondent of his right to appeal within fifteen days, indicated nevertheless only one tribunal of the second instance, failing absolutely to mention the right to appeal to Our Tribunal (cf. can 1444, §1,1º), acting contrary to the prescript of canon 1614.

On 20 February 2000, the respondent disclosed to the judge his formal intention to appeal by fully observing the useful time limits: "This letter will serve notice of my intent, pending my review of it, to appeal your affirmative decision." In fact the respondent demanded some help from the judge.

Then on 14 March 2000, the respondent interposed an appeal to Our Apostolic Tribunal presenting also the reasons to the judge of the first instance: "The reasons are numerous including but not limited to the fact that the grounds cited did not exist (a fact that no one knows better than I), the grounds were not proven and they were based upon false and inaccurate and faulty assumptions." Nor may one impute to the respondent that he had proposed the appeal outside the peremptory time period, because with the failure to observe the norm of law concerning legitimate notification of the sentence, the peremptory time period would not have run.

But the matter turned more serious, namely when the judge *a quo* illegitimately arrogated to himself the right sanctioned by canon 1643. In fact the judicial vicar of the first grade admonished the respondent on 21 March 2000 about the conditions for prosecuting the appeal, but not correctly, perhaps referring himself to the abrogated canon 1884, §1 of *CIC* 1917, which demanded in the prosecution of an appeal also a copy of the *libellus* of appeal which he had presented to the lower judge. In fact, he wrote: "The Code states, you are to enclose a copy of the judgement and indicate the

reasons for the appeal (can. 1634).” And the respondent had to present this only to the appeal tribunal.

But the list of violations continues, by demanding what the law does not impose, at least in the *libellus* of prosecution: “Along with the reasons would be supporting testimony on your part. Witnesses, would be necessary to back your reasons”; and by determining a peremptory time period until 24 April 2000.

7. On 25 April 2000, the judicial vicar of Green Bay, despite repeated manifestation of the man’s intention to appeal to Our Apostolic Tribunal made on 12 April, declared the appeal of the respondent to the Rota abandoned, because he had not presented reasons to the tribunal *a quo*: “Your letter stating the reasons of the appeal and the evidence supporting those has not arrived therefore, your case has been abandoned by law and this Tribunal has to forward the acts to the Archdiocese of Milwaukee Tribunal for ratification process [...] the case cannot be forwarded to the Roman Rota.”

The Fathers were stunned by such a grave ignorance of law on the part of the Administrators of the Tribunals, in the case, who abused the jurisdiction of the Church causing irremediable nullities (cf. cann. 1620, 1º; 1443; 1444, §1,1º), and consequently violating the rights of the Christian faithful.

Therefore, both the act of the College of 16 May 2000, whose inscription reads: “Notation of the *Turnus*,” by which it was decided: “Given that the Respondent in this case was thus unable or unwilling to indicate, even in summary fashion, reasons for the appeal as required by can. 1634, this Tribunal […] proceeded as the proper appellate Tribunal under the norms of can. 1438,” and the decree of confirmation of the sentence of the first grade by the Milwaukee Tribunal issued on the same day are invalid, because they suffer from an irremediable defect since they were issued by an absolutely incompetent judge (cf. can. 1620, 1º).

8. In view of the appeal interposed by the respondent party to Our Apostolic Tribunal, the competence to pursue the procedure further in the case according to the norm of canon 1682, §2 flows from the declaration of absolute nullity of the above mentioned decree of confirmation of the Milwaukee Tribunal. Therefore, we must consider as of no value whatsoever the declaration of the judicial vicar of Green Bay, who in his letter sent to the Supreme Tribunal of the Apostolic Signatura on 27 June 2000, presuming to speak for the petitioner, contended: “After a few days she contacted me to state that she will be withdrawing her petition.”

9. Having maturely weighed everything said in law and in fact, the undersigned Fathers Auditors of the *Turnus* decided to respond to the incidental question as they respond:

> **AFFIRMATIVELY,** THAT IS, THE DECREE OF CONFIRMATION ISSUED BY THE APPEAL TRIBUNAL OF MILWAUKEE ON 16 MAY 2000 IS NULL IN THE CASE.

The cause will have to be judged anew at the Roman Rota because of the appeal interposed by the man respondent.

Given in Rome, at the seat of the Tribunal of the Roman Rota, on 22 June 2001.

Pius Vitus PINTO, *Ponens*
Ioannes G. ALWAN
Iordanus CABERLETTI

A second decree was issued in the case on 16 May 2003.

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NOTES BIOGRAPHIQUES
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